

EDITOR'S NOTE

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85-781-CFX
Status: GRANTED

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November 5, 1985

Title: Frank G. Burke, Acting Archivist of the United
States and Ronald Geisler, Executive Clerk of the
White House, Petitioners
V.
Michael D. Barnes, et al.

Court: United States Court of Appeals for
the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Davidson, Michael, Ross, Steven R.,
Ratner, Michael, Frankel, Morgan J.

try	Date	Note	Proceedings and Orders
1	Nov 5 1985	G	Petition for writ of certiorari filed.
2	Nov 5 1985		Appendix of petitioner Frank G. Burke, etc., et al. filed.
4	Nov 27 1985		Order extending time to file response to petition until January 8, 1986.
5	JUL 8 1986		Brief of respondents Speaker Tip O'Neil, et al. in opposition filed.
6	Jan 8 1986		Brief of respondent US Senate in opposition filed.
7	Jan 8 1986		DISTRIBUTED. January 24, 1986
8	Jan 21 1986	X	Reply brief of petitioners Frank G. Burke, etc., et al. filed.
1	Feb 7 1986		REDISTRIBUTED. February 21, 1986.
3	Feb 24 1986		REDISTRIBUTED. February 28, 1986
4	Mar 3 1986		Petition GRANTED.
6	Apr 14 1986		***** Order extending time to file brief of petitioner on the merits until May 17, 1986.
7	Apr 23 1986		Record filed.
8	Apr 23 1986		Certified copy of C. A. proceedings received.
9	May 5 1986		Record filed.
10	May 5 1986		Certified copy of original record on appeal received.
1	May 15 1986		Order further extending time to file brief of petitioner on the merits until June 16, 1986.
2	May 16 1986		Joint appendix filed.
4	Jun 12 1986		Order further extending time to file brief of petitioner on the merits until June 20, 1986.
5	Jun 20 1986		Brief of petitioners Frank G. Burke, etc., et al. filed.
7	Jul 2 1986		Order extending time to file brief of respondent on the merits until August 23, 1986.
8	Aug 14 1986		Order further extending time to file brief of respondent on the merits until September 6, 1986.
9	Aug 14 1986		Application of respondents' for leave to file a brief on the merits in excess of the page limitation filed
10	Aug 14 1986		(A-118), and order granting same by Brennan, J., on August 15, 1986. The brief may not exceed 70 pages.
1	Sep 5 1986		Brief of respondents Speaker and Bipartisan Leadership of the House filed.
2	Sep 5 1986		Brief of respondent US Senate filed.
3	Sep 5 1986		Brief amicus curiae of Senator John Melcher, et al. filed.
4	Sep 9 1986	D	Motion of respondents for divided argument filed.

try	Date	Note	Proceedings and Orders
5	Sep 12 1986	CIRCULATED.	
6	Sep 3 1986	SET FOR ARGUMENT. Tuesday, November 4, 1986. (4th case) (1 hour)	
7	Oct 14 1986	Motion of respondents for divided argument DENIED. Justice Scalia OUT.	
8	Oct 29 1986	X Reply brief of petitioners Frank G. Burke, etc., et al. filed.	
9	Nov 4 1986	ARGUED.	

85-781 (1)

No.

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, and RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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36 pp

QUESTIONS PRESENTED

1. Whether the expiration of a bill renders moot a dispute over whether it had become law.

2. Whether individual members of Congress, the Speaker and bipartisan leadership of the House of Representatives, and the United States Senate have standing to challenge whether, under the Pocket Veto Clause, a bill had become law.

3. Whether the Pocket Veto Clause, which provides that a bill not signed by the President within ten days does not become law if "Congress by their Adjournment prevent its Return," applies when Congress is in adjournment between sessions.

PARTIES TO THE PROCEEDING

The appellees in the court of appeals were Ray Kline, Acting Administrator of General Services, and Ronald Geisler, Executive Clerk of the White House. Effective April 1, 1985, responsibility for publishing the Statutes at Large and preserving the laws of the United States was transferred from the Administrator of General Services to the Archivist of the United States. National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291, 1 U.S.C. (Supp. II) 106a, 112. Accordingly, Frank G. Burke, Acting Archivist of the United States, has been substituted for the Acting Administrator of General Services.

The appellants in the court of appeals were the plaintiffs and intervenors in the district court. The plaintiffs were 33 members of the House of Representatives: Michael D. Barnes, Gary Ackerman, Howard Berman, John Conyers, Ronald V. Dellums, Mervyn Dymally, Dennis Eckart, Robert W. Edgar, Vic Fazio, Ed Feighan, Barney Frank, Robert Garcia, Samuel Gejdenson, Peter Kostmeyer, Mickey Leland, Mel Levine, Robert Matsui, Matt McHugh, Edward J. Markey, Barbara A. Mikulski, George Miller, Bruce Morrison, Mary Rose Oaker, James L. Oberstar, Richard L. Ottinger, Patricia Schroeder, Paul Simon, Ferdinand St. Germain, Gerry Studds, Robert Torricelli, Bruce Vento, Ted Weiss, and Howard Wolpe. The intervenors were the United States Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives: Thomas P. O'Neill, Jr., Jim Wright, Robert H. Michel, Thomas S. Foley, and Trent Lott.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, and RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

The Solicitor General, on behalf of Frank G. Burke, Acting Archivist of the United States, and Ronald Geisler, Executive Clerk of the White House, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-118a) is reported at 759 F.2d 21. The memorandum of the district court (App. 119a-132a) is reported at 582 F. Supp. 163.

JURISDICTION

The judgment of the court of appeals (App. 137a-138a) was entered on August 29, 1984. A petition for rehearing was denied on August 7, 1985 (App. 133a-134a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 7, Clause 2 of the Constitution provides in pertinent part:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

H.R. 4042, 98th Cong., 1st Sess. (1983), and Section 728 of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1555, as amended by Pub. L. No. 97-233, 96 Stat. 260, and Pub. L. No. 98-53, 97 Stat. 287, 22 U.S.C. (& Supp. I) 2370 note, are set forth at App. 141a-145a.

STATEMENT

1. On November 18, 1983, a bill originating in the House of Representatives, H.R. 4042, 98th Cong., 1st Sess. (App. 141a), was presented to the President for his consideration (*id.* at 4a-5a). The bill provided that, "until such time as the Congress enacts new legislation * * * or until September 30, 1984, whichever occurs first" (*id.* at 141a), the requirements of Section 728 of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1555, 22 U.S.C. (& Supp. I) 2370 note (App. 141a-145a), which had expired on September 30, 1983, "shall continue to apply" (*id.* at 141a). Section 728 conditioned continued United States military aid to El Salvador upon semiannual certification by the President that that country was achieving progress in protecting human rights (*id.* at 4a n.6, 141a-145a).

On the same day that H.R. 4042 was presented to the President, the Senate and the House of Representatives ended the first session of the 98th Congress and ad-

journing sine die. App. 5a; H.R. Con. Res. 221, 98th Cong., 1st Sess. (1983); 129 Cong. Rec. S16779, S16858, H10469 (daily ed. Nov. 18, 1983). By a separate resolution, the House and Senate agreed to reconvene for the second session of the 98th Congress on January 23, 1984, some nine weeks later. App. 5a; H.R. J. Res. 421, 98th Cong., 1st Sess (1983); 129 Cong. Rec. H10105 (daily ed. Nov. 17, 1983); *id.* at S16858 (daily ed. Nov. 18, 1983). During the period of intersession adjournment, a standing rule of the House authorized its Clerk to "receive messages from the President and from the Senate at any time that the House is not in session." H.R. Rule III, cl. 5, reprinted in H.R. Doc. 271, 97th Cong., 2d Sess. 318 (1982); App. 5a. The Senate conferred similar, temporary authority on its Secretary. 129 Cong. Rec. S17192-S17193 (daily ed. Nov. 18, 1983); App. 5a.

The President neither signed H.R. 4042 nor returned it to the House of Representatives with a veto message. On November 30, 1983, the White House issued a statement announcing that the President was withholding his approval from H.R. 4042 and explaining his reasons for doing so (19 Weekly Comp. Pres. Doc. 1627). In the President's view, H.R. 4042 had not become law under the Pocket Veto Clause, U.S. Const. Art. I, § 7, Cl. 2, because Congress was in adjournment on November 30, 1983, the tenth day (excluding Sundays) following presentment of the bill on November 18. Accordingly, petitioners, who are responsible for effecting the preservation and publication in the Statutes at Large of bills that become law,¹ have not published H.R. 4042 as a public law of the United States. App. 5a-6a.

¹ See 1 U.S.C. (Supp. II) 106a, 112. The original defendants were petitioner Ronald Geisler, Executive Clerk of the White House (whose duty is to deliver acts of Congress that have become law to the appropriate official for publication and preservation), and Gerald P. Carmen, then Administrator of General Services (who at the time was charged with publishing and preserving the laws

2. On January 4, 1984, 33 members of the House of Representatives filed this action in the United States District Court for the District of Columbia, seeking a declaration that the President's pocket veto of H.R. 4042 was invalid and that the bill had become a law of the United States, and an injunction requiring petitioners to cause the bill to be published in the Statutes at Large (App. 6a, 120a). The Senate and the Speaker and Bipartisan Leadership Group of the House intervened in support of plaintiffs (*id.* at 2a-3a & n.3, 119a & n.1) and, with them, are respondents here. Respondents argued that the pocket veto is an "anachronism" (*id.* at 123a) in light of the "appointment of agents by both houses to receive and record Presidential messages in the members' absences, and modern means of communication and transportation" (*id.* at 124a (footnote omitted)).

On cross-motions for summary judgment, the district court granted summary judgment for petitioners and dismissed the complaint (App. 119a-132a). The district court concluded (*id.* at 130) that it had no "license to depart from the only case directly in point," this Court's decision in *The Pocket Veto Case*, 279 U.S. 655 (1929). In the district court's view, the question presented in *The Pocket Veto Case*, whether a bill "'presented to the President less than ten days (Sundays excepted) before the adjournment of that session'" of Congress becomes law if the President neither signs nor returns it, "is identical to the question presented by the instant case" (App. 126a (quoting 279 U.S. at 672)). Because the Supreme

of the United States). See App. 119a-120a; 1 U.S.C. (1982 ed.) 106a, 112. Ray Kline, the Acting Administrator of General Services, was later substituted for Carmen. App. 3a & n.4. In view of the transfer of relevant responsibilities to the Archivist of the United States (see National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291), Frank G. Burke, Acting Archivist of the United States, has been substituted for Kline as a petitioner. For simplicity, we include Burke's predecessors in our references to "petitioners."

Court decided in *The Pocket Veto Case* that the President may pocket veto bills during intersession adjournments, the district court concluded that his reliance on the Pocket Veto Clause with respect to H.R. 4042 was equally proper, "[u]nless and until the Supreme Court reconsiders the rule of that case" (App. 130a-131a).

3. a. A divided panel of the court of appeals reversed and remanded for entry of judgment in respondents' favor (App. 1a-118a). In response to the dissent, the majority first addressed respondents' standing (*id.* at 8a-18a).² The court of appeals relied primarily on its decision in *Kennedy v. Sampson*, 511 F.2d 430 (1974), which held that a Senator had standing to challenge an intrasession pocket veto on the ground that the pocket veto had "nullified his original vote in favor of the legislation" (App. 8a). The respondent members of Congress "allege an injury identical to that of the individual lawmaker in *Kennedy v. Sampson*" (*id.* at 9a). The court also observed that *Sampson* stated that "either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process" (*ibid.*). In this case, the intervening Senate and Speaker and Bipartisan Leadership Group of the House "assert an injury of th[is] second, more direct type" (*ibid.*). "Under the law of this circuit, therefore," the majority concluded, "all the [respondents] are properly before th[e] court" (*ibid.* (footnote omitted)).³

² In light of established circuit precedent, petitioners did not initially contest that the Senate had standing to bring this action (App. 15a-17a & n.16). However, upon further consideration, we argued in our supplemental petition for rehearing (at 7-10 & n.1) that none of the respondents has standing.

³ The majority noted that, because of its "concern for the separation of powers," the court of appeals had developed a discretionary doctrine "to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view," notwithstanding their satisfaction of the circuit's jurisdictional standing requirements (App. 13a-

Turning to the merits, the court of appeals held that Congress's intersession adjournment did not "prevent[] * * * [the] Return" of H.R. 4042 within the meaning of the Pocket Veto Clause because, "by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it" (App. 20a (emphasis in original)). The court of appeals acknowledged (*id.* at 26a (quoting 279 U.S. at 684)) that in *The Pocket Veto Case* this Court stated that an intersession adjournment would prevent the President from returning a bill to Congress "even if" Congress had authorized an agent to receive messages, but it believed that *Wright v. United States*, 302 U.S. 583 (1938), "made clear" that this Court was "not categorically denying the use of agents for delivery of veto messages" (App. 27a). In *Wright*, the Court held that the President's return veto of a bill was effective where he had delivered the bill to an agent of the originating house while that house was in a three-day intrasession recess. The court of appeals reasoned that the "rule of construction" established in *Wright* "required a court to find that the President was truly deprived of his opportunity to exercise his qualified veto power before it may hold that return was 'prevented'" under the Pocket Veto Clause (*id.* at 29a).

Thus, according to the court of appeals, "whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective only if, under the circumstances of that type of adjournment, such a procedure would not occasion undue delay or uncertainty over the returned bill's status" (App. 32a (emphasis omitted)). In *Kennedy v. Sampson*, *supra*, the court of appeals held that "return is not prevented by an intrasession adjournment of any length * * * so long as the originating house arranged for receipt of veto mes-

14a). The court found this doctrine inapplicable here because "the legislators' dispute is solely with the executive branch" (*id.* at 15a).

sages" (App. 30a). Because intersession adjournments "do not differ in any practical respect from * * * intrasession adjournments" (*id.* at 33a), the court refused to draw what it viewed as "an irrational line between intrasession and intersession adjournments" (*id.* at 38a).

Although it recognized that "clear rules respecting the pocket veto are vitally necessary" (App. 38a), the court of appeals refused to "choose * * * any line" (*id.* at 45a) readily distinguishing those situations in which a pocket veto is permissible from those where a return veto is required. Rather, the court concluded that "[t]he existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business [between sessions] and the duration of modern intersession adjournments" were sufficient, "taken together, [to] satisfy" it that Congress's nine-week intersession adjournment in this case did not prevent the return of H.R. 4042 (*id.* at 46a). Accordingly, the court held that the President's pocket veto of the bill was ineffective and that H.R. 4042 therefore had become law.

b. In a lengthy dissent that did not reach the merits, Judge Bork concluded that respondents lacked standing because "impairment of government powers is [not] a judicially cognizable injury, that is, an 'injury in fact' for purposes of article III" (App. 73a n.9). Judge Bork believed that the standing doctrine applied by the majority would cause "a major shift in basic constitutional arrangements" that is "flatly inconsistent with the judicial function designed by the Framers of the Constitution" (*id.* at 47a, 48a). In the dissent's view, the doctrine of congressional standing is misconceived because there is no distinction between suits alleging injury to lawmaking powers and those seeking to require the President faithfully to execute a particular statute (*id.* at 56a-57a n.3): both raise "only a 'generalized grievance' about an allegedly unconstitutional operation of government" (*id.* at 65a). Because "[i]t is well settled that citizens, whose interest is here asserted derivatively, would have no

standing to maintain this action," Judge Bork concluded that "it is impossible that these representatives should have standing that their constituents lack" (*id.* at 65a-66a (footnote omitted)).⁴

Judge Bork concluded that "the doctrine of congressional standing is ruled out by binding Supreme Court precedent" (App. 61a); he relied in particular on this Court's decisions holding that plaintiffs do not have standing to complain of "generalized grievances" (*id.* at 64a) and those making clear that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers" (*id.* at 70a (quoting *Allen v. Wright*, No. 81-757 (July 3, 1984), slip op. 13)). The "fundamental consideration," he stated, is "the need to limit the role of the courts in the interplay of our various governmental institutions" (App. 76a). In Judge Bork's view, to allow congressional standing would lead to a dangerous arrogation of power within the judiciary (*id.* at 76a-78a):

A federal judiciary that is available on demand to lay down the rules of the powers and duties of other branches and of federal and state governments will quickly become the single, dominant power in our governmental arrangements. The concept of the fragmentation of power, upon which both the ideas of the separation of powers and of federalism rest, will be, if not destroyed, at least very seriously eroded.

* * * * *

The concept of standing prevents this undesirable centralization of authority by severely limiting the occasions upon which courts are authorized to lay down the rules for governments and institutions of government.

⁴ In Judge Bork's view, the institutional intervenors lack standing for the same reason as do the individual members of the House (App. 43a n.1).

Accordingly, courts should entertain suits such as this one only at the behest of "a private party who ha[s] a direct stake in the outcome," as in *The Pocket Veto Case* itself (*id.* at 64a).

Finally, Judge Bork urged that his position is consistent with the intent of the Framers (App. 81a-89a), that the equitable discretion doctrine developed by the court of appeals to limit the breadth of its standing rules (see pages 5-6 note 3, *supra*) is unsupportable (App. 89a-95a), and that the cases on which the majority relied do not support its position (*id.* at 95a-116a). Judge Bork concluded that "[t]he legitimacy, and thus the priceless safeguards of the American tradition of judicial review may decline precipitously" if the "drastic rearrangement of constitutional structures" entailed by the congressional standing doctrine is "allowed to take hold" (*id.* at 116a, 117a).

4. The court of appeals entered its judgment (App. 137a-138a) on August 29, 1984, one month before the expiration of H.R. 4042, but it did not issue the majority and dissenting opinions until April 12, 1985 (see *id.* at 1a). Pursuant to orders of the court, petitioners filed a supplemental petition for rehearing on May 17, 1985,⁵ urging (in addition to arguments on standing and the merits) that the controversy had become moot following the expiration of H.R. 4042 on September 30, 1984.⁶ On August 7, 1985, the panel, Judge Bork dissenting, denied the petition for rehearing (*id.* at 133a-134a), and the full court, Judges Bork, Scalia, and Starr dissenting, denied the suggestion for rehearing en banc (*id.* at 135a-136a).

⁵ Following entry of the court's judgment, petitioners had filed a brief rehearing petition requesting leave to file a supplemental petition after issuance of the opinions.

⁶ On June 4, 1985, the court directed (App. 139a-140a) respondents to file briefs addressing whether the case was moot and also permitted petitioners to file a supplemental brief on this issue, which we did.

REASONS FOR GRANTING THE PETITION

This case presents two questions of great significance: whether the houses of Congress and their members have standing to complain that the President is not treating a bill as law and whether the Pocket Veto Clause applies to intersession adjournments of Congress. The court of appeals erroneously decided each of these questions in concluding that H.R. 4042 became law. It committed a more fundamental error, however, in refusing, without explanation, to vacate its judgment as moot following the expiration of H.R. 4042 on September 30, 1984. The opinions in this case, issued more than six months after the bill had by its own terms expired, are advisory and nothing more. In order "to prevent [the] judgment, unreviewable because of mootness, from spawning any legal consequences" (*United States v. Munsingwear, Inc.*, 340 U.S. 36, 41 (1950)), this Court should grant the petition, vacate the judgment below, and remand with directions to dismiss the action as moot.

In any event, the court of appeals manifestly erred in holding that respondents have standing and that the President may not rely on the pocket veto while Congress is in adjournment between sessions. Respondents' complaint is logically indistinguishable from one that the President refused to enforce a validly enacted law: such a refusal would "nullify legislators' votes and impair the law-making powers of Congress just as surely as if the President had employed the pocket veto" (App. 56a n.3 (Bork, J., dissenting)). Yet legislators, no less than other concerned citizens, plainly lack standing to bring a suit alleging only injury to their interest in seeing that the President fulfills his duty under Article II faithfully to execute the laws. Finally, the court of appeals erred by failing to acknowledge the controlling effect of this Court's decision in *The Pocket Veto Case*, "the only case directly in point" (App. 130a). Under *The Pocket Veto Case*, an adjournment of the Congress prevents the return of bills within the meaning of the constitutional provi-

sion. Accordingly, the President was not required to return H.R. 4042 with a veto message. Because the President did not sign H.R. 4042, it did not become law.

1. a. As plaintiffs stated in the court of appeals,⁷ they did not bring this action "merely to assert an abstract interest in bill publication." Rather, respondents sought a declaration that H.R. 4042 had become law so that the President would comply with the certification requirements that the bill established as a precondition to further military aid to El Salvador through, at the latest, September 30, 1984.⁸ The simple and undeniable truth is that this controversy over whether H.R. 4042 was a valid law of the United States became moot when the bill expired last year. Regardless of whether H.R. 4042 *was* a law, it plainly is not *now* a law, and no form of judicial relief can change that fact. There is no certification yet to be made under the bill; mere publication of the bill would at this point vindicate no interest of respondents; the funds already spent cannot now be recovered, as plaintiffs have acknowledged;⁹ and in any event, this is not

⁷ Brief in Support of Emergency Motion for Expedited Appeal and Decision Thereon or for Issuance of a Writ of Mandamus 6 (Jan. 10, 1984).

⁸ To that end, plaintiffs, simultaneously with the filing of their complaint on January 4, 1984, requested a ruling from the district court before January 16, 1984, the date on which the next certification would have been due had the bill become law. See Motion for Preliminary Injunction (Jan. 4, 1984); Motion to Shorten Time for Filing of Opposition to Motion for Preliminary Injunction and to Shorten Time for Oral Hearing on Preliminary Injunction (Jan. 4, 1984). When the district court denied their motions, plaintiffs unsuccessfully sought the same relief on an emergency basis from the court of appeals. See Emergency Motion for Expedited Appeal and Decision Thereon or for Issuance of a Writ of Mandamus (Jan. 10, 1984).

⁹ See Declaration of Michael Ratner in Support of Motion to Shorten Time for Defendants to Serve and File Opposition and to Shorten Time for Oral Argument 2 (Jan. 4, 1984); Brief in Support of Motion for Expedited Appeal 3-4.

an action seeking the recoupment of funds, for which respondents would plainly lack standing regardless of their standing to challenge the pocket veto of a live bill.

This case has therefore “lost its character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract propositions of law.” *Hall v. Beals*, 396 U.S. 45, 48 (1969). It is fundamental that a challenge to a statute becomes moot when the statute is no longer in force. See, e.g., *Kremens v. Bartley*, 431 U.S. 119, 128-129 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-415 (1972); cf. *National Organization for Women, Inc. (NOW) v. Idaho*, 459 U.S. 809 (1982) (challenge to Congress’s extension of ratification period for constitutional amendment became moot when period, as extended, expired without ratification). Here as well, there is no longer “a real and substantial controversy” (*Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citation omitted)) over the validity of H.R. 4042. Despite plaintiffs’ frenzied efforts early in the litigation to obtain a judgment at a time when one in their favor could have provided meaningful relief (see page 11 note 8, *supra*) H.R. 4042 expired before the suit could be completed, leaving only the court of appeals’ “opinion advising what the law would be upon a hypothetical state of facts” (*Preiser*, 422 U.S. at 401 (citation omitted)). Accordingly, this Court should follow its “established practice” of “vacat[ing] the judgment below and remand[ing] with a direction to dismiss.” *United States v. Munsingwear, Inc.*, 340 U.S. at 39 (footnote omitted). Such a course is especially appropriate here, where the court of appeals’ opinion decides fundamental constitutional questions, which may “‘legitimate[ly] [be resolved] only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.’” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (citation omitted).

b. In response to the court of appeals’ order directing respondents to brief the issue of mootness (App. 139a-

140a), respondents argued that the case remains live in two respects: first, that they are still entitled to see H.R. 4042 preserved and published in the Statutes at Large, and second, that the expenditure of funds to which H.R. 4042 would have applied might be audited in the future, giving rise to a recoupment proceeding against the responsible officials. These attempts to grasp at collateral consequences—one purely formal and the other wholly speculative—are insufficient to demonstrate that respondents continue to have “a legally cognizable interest in the outcome” of the case (*Powell v. McCormack*, 395 U.S. 486, 496 (1969)), regardless of whether they had such an interest at the time that the litigation commenced.¹⁰

i. Respondents’ suggestion that they have a continuing interest in the preservation and publication of H.R. 4042 pursuant to 1 U.S.C. (Supp. II) 106a, 112 would change this case from a dispute over whether a bill was validly enacted into a “debate[] concerning harmless, empty

¹⁰ Respondents also argued that this case fits within the exception to the mootness doctrine for those controversies that are “capable of repetition, yet evading review.” This claim borders on the frivolous. Most bills, unlike H.R. 4042, do not automatically expire within a short time, leaving behind no vested private rights. Accordingly, there is nothing “by nature short-lived” (*Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 547 (1976)) about a dispute over whether a bill has been pocket vetoed. Indeed, past disputes arising out of pocket vetoes, such as the one resolved in *The Pocket Veto Case*, have not evaded review.

The court of appeals never explained why the expiration of H.R. 4042, which occurred shortly after it issued its judgment but months before it issued its opinion, has not rendered the case moot. The court did hold that a supplemental appropriations statute passed subsequent to H.R. 4042 did not constitute “new legislation providing conditions for United States military assistance to El Salvador” that would have terminated the bill prior to September 30, 1984. App. 8a n.10; see *id.* at 141a. The court’s reasoning, relying on “further appropriations to which the certification requirements of H.R. 4042 might apply” in order to find that “a live controversy remain[ed] for [it] to resolve” (*id.* at 8a n.10), should have led it to conclude that this case became moot after the date on which the bill indisputably expired.

shadows." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion). Although respondents sought this relief in their complaints, it had (until the bill expired) always been viewed as merely a formal acknowledgement, in which respondents had only an "abstract" interest (page 11, *supra*), of the fundamental relief that they desired: vindication of their constitutional role in the passage of the bill through presidential compliance with the certification requirements of H.R. 4042. As plaintiffs explained, "[v]indication of the effectiveness of [their] votes require[d] a ruling that the law take effect when, by its own terms, its *substantive legal consequences* come into play."¹¹

Even if the dispute over whether the preservation and publication requirements of Sections 106a and 112 of Title 1 were complied with were somehow sufficient to give rise to a continuing live controversy, it is plain that respondents lack standing to seek enforcement of those provisions.¹² The purpose of the statutes governing preservation of government records is not to confer a judi-

¹¹ Plaintiffs' Reply to Defendants' Opposition to Plaintiffs' Motion to Shorten Time 3 (Jan. 7, 1984) (emphasis added). Plaintiffs further explained in their complaint (at 7; C.A. App. 27) that "[u]nless H.R. 4042 is delivered and published as law by [petitioners] * * * military aid to El Salvador will continue illegally, without the required presidential certification." It is for this reason that the failure to deliver and publish H.R. 4042 allegedly "nullified plaintiffs' votes in favor of the bill" (Plaintiffs' Complaint 12; C.A. App. 32) and deprived the intervenors "of their constitutional role in the enactment of legislation" (Senate's Complaint in Intervention 4; Speaker's and Bipartisan Leadership of the House's Complaint in Intervention 5).

¹² If this suit were in fact a dispute over the requirements of 1 U.S.C. (Supp. II) 106a and 112, the question of congressional standing to seek review of a presidential pocket veto would have been irrelevant. Respondents would have needed instead to demonstrate standing to enforce these statutes, an issue never addressed by the court of appeals. The efficacy of the pocket veto would have arisen only as a defense raised by petitioners, as to which respondents would not themselves have needed to show standing.

cially enforceable right on any person but "solely to benefit [federal] agencies * * * and the Federal Government as a whole" by ensuring that government officials "have the information [they] need[] available when [they] need[] it.'" *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980) (citation omitted). Publication of the Statutes at Large is obviously designed only for the benefit of the general public. These statutes merely regulate matters of government housekeeping—they do not serve the interests of Congress and its members with respect to their constitutional role in the enactment of legislation. Respondents' reliance on them now that H.R. 4042 has expired would "transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Allen v. Wright*, No. 81-757 (July 3, 1984), slip op. 17-18 (citation omitted). Accordingly, respondents' desire for such a purely formal acknowledgement of their victory cannot keep this case alive. Cf. *Ashcroft v. Mattis*, 431 U.S. 171, 173 (1977) ("Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot.").¹³

ii. Respondents also suggested that this controversy is not moot because the former validity of H.R. 4042 would

¹³ Respondents' contention that this case is still live because they seek formal recognition of their position that H.R. 4042 was once law is similar to an argument rejected by the Court in *NOW v. Idaho*, *supra*. There, the State of Idaho urged unsuccessfully that a challenge to Congress's power to extend the ratification period for the Equal Rights Amendment was not moot because the Administrator of General Services, by "refusing to make any official announcement honoring the rescinding resolutions of other states," had "damaged the sovereign power and authority of the states" and "deprived members of the Idaho Legislature of the effectiveness of their votes." Response of the States of Idaho and Arizona, *et al.*, in Opposition to the Administrator's Suggestion of Mootness at 11, *NOW v. Idaho*, *supra*. Such an "official announcement" is all that respondents seek here.

still be relevant to investigation into and possible recovery of funds expended on military aid to El Salvador without the certification that would have been required had the bill been law. See 31 U.S.C. 1341, 1349-1351, 3521 *et seq.* But the former validity of H.R. 4042 is irrelevant to the ability of any congressional committee to investigate the expenditure of funds or of the Comptroller General or responsible officials in the Executive Branch to audit the El Salvador aid accounts. Moreover, there is no possibility of recovering the funds expended, as plaintiffs have acknowledged (see page 11 & note 9, *supra*).¹⁴ Finally, respondents have never sought in this action to enforce an auditing or repayment obligation, and they obviously would lack standing to do so. See, *e.g.*, *United States v. Richardson*, 418 U.S. 166 (1974); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1381-1382 (D.C. Cir. 1984).¹⁵ Respondents have failed to advance any plausible reason for rejecting the natural and obvious conclusion that the expiration of H.R. 4042 rendered this action moot.

2. This case would be nonjusticiable even if H.R. 4042 could still be resurrected because respondents have from the outset lacked standing. They alleged only that the votes of the individual plaintiffs in favor of the bill have been "nullified" (App. 8a) and that the "lawmaking powers of the two houses of Congress" have been "injur[ed]" (*id.* at 9a (footnote omitted)). Relying on a doctrine of congressional standing unique to the District

¹⁴ Plaintiffs' failure to obtain a preliminary injunction requiring that H.R. 4042 be treated as a valid law pending the outcome of this case (see page 11 note 8, *supra*) obviates any claim that the responsible officials acted in bad faith in disbursing funds. See generally 31 U.S.C. 3527(c), 3528(b)(1).

¹⁵ As with respondents' argument concerning the publication of H.R. 4042 (see page 14 note 12, *supra*), this asserted basis for a continuing controversy has nothing to do with congressional standing to challenge a pocket veto.

of Columbia Circuit,¹⁶ the court of appeals held that these allegations were sufficient to confer standing on respondents (*ibid.*). This doctrine, however, ignores the concern for separation of powers that, as this Court recently emphasized, provides the foundation on which the law of standing is based. *Allen v. Wright*, No. 81-757 (July 3, 1984), slip op. 13; see App. 70a-76a (Bork, J., dissenting); *Moore v. United States House of Representatives*, 733 F.2d 946, 961 (D.C. Cir. 1984) (Scalia, J., concurring in the result), cert. denied, No. 84-389 (Jan. 7, 1985). At bottom, respondents complain of nothing more than the President's failure to execute H.R. 4042 and his consequent expenditure of funds in violation of its provisions. This is a matter, however, that is firmly committed by the Constitution to the Executive Branch. Respondents, like citizens and taxpayers generally, lack standing to challenge the President's action in federal court.

a. The court of appeals' congressional standing doctrine is seriously misconceived. It rests on a "philosophy [that] has no place in our constitutional scheme"—"that the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best merely convenient vehicles for doing so and at worst nuisances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge*

¹⁶ See, *e.g.*, *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, No. 84-389 (Jan. 7, 1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). The doctrine has thus far gone unreviewed by this Court: in those cases where the Court denied certiorari, unlike in this case, the court of appeals had, "largely through application of the doctrine of equitable discretion [see pages 5-6 note 3, *supra*, & pages 18-19, *infra*], * * * awarded judgment for the party that was challenging standing." *Moore*, 733 F.2d at 960 (Scalia, J., concurring in the result) (emphasis in original).

Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 489 (1982); see generally *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) (footnote omitted) ("Relaxation of standing requirements is directly related to the expansion of judicial power."). As Judge Bork explained (App. 75a):

The court has fashioned a doctrine, in contradiction of *Allen v. Wright*, that transforms it from a tribunal exercising its powers "only in the last resort and as a necessity" to a governing body for the entire federal government * * *. Plainly, the courts of this circuit, if no other, are now not the last but the first resort. We have abandoned concern that our performance be "consistent with a system of separated powers" for a role of continual and pervasive intrusiveness into the relationships of the branches * * *. [N]o one ever thought, until we did, that courts should step directly between the other branches and settle disputes, presented in the abstract, about powers of governance.

The doctrine of congressional standing is inconsistent with this Court's understanding of Article III and should therefore be repudiated.

The District of Columbia Circuit has recognized the "growing phenomenon [of] individual members of Congress challeng[ing] actions or failure to act as violations of the members' interests as legislators." *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985). All that the court of appeals has done "[t]o make its standing doctrine more palatable" (App. 89a (Bork, J., dissenting)) in the face of this "plethora of cases" (*Gregg*, 771 F.2d at 543), however, is to grant itself the "sky-hook of equitable discretion" (*Moore*, 733 F.2d at 960 (Scalia, J., concurring in the result)) to deny relief where "individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view * * * seek the court's aid in overturning

the results of the legislative process" (App. 13a-14a). As Judges Bork (*id.* at 89a-95a) and Scalia (*Moore*, 733 F.2d at 961-965) have made clear, this doctrine is wholly unsatisfactory, as it fails to effectuate this Court's standing principles and "makes cases turn on nothing more than the sensitivity of a particular trio of judges" (App. 94a).

b. The court of appeals' error in this case is manifest. If the President had admitted that H.R. 4042 were law but refused to enforce it, respondents plainly would have lacked standing to sue: "The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to 'take Care that the Laws be faithfully executed.' U.S. Const., Art. II, § 3" (*Allen v. Wright*, slip op. 23). All that respondents could have raised in such circumstances is a claim that funds had illegally been expended on military aid to El Salvador without the certification required under H.R. 4042. No one, however, has standing to assert merely an "abstract injury in nonobservance of the Constitution" or federal statutes. *Schlesinger v. Reservists Committee to Stop the War* (*Reservists*), 418 U.S. 208, 222 n.13 (1974). Rather, "[t]his Court has repeatedly rejected claims of standing predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Valley Forge Christian College*, 454 U.S. at 482-483 (quotation marks and citations omitted). See, e.g., *Allen v. Wright*, slip op. 16; *Reservists*, 418 U.S. at 217; *Ex parte Levitt*, 302 U.S. 633 (1938).¹⁷

¹⁷ This limitation on standing is especially salient in the context of an attack on the spending practices of the Executive Branch. The Court emphasized in *Valley Forge Christian College* that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing" (454 U.S. at 477), and that the limited exception to this rule enunciated in *Flast v. Cohen*, 392 U.S. 83 (1968), is inapplicable to challenges directed at actions of the President (454 U.S. at 479).

Congress and its members are not injured in any fashion distinct from that of citizens generally by the President's failure to enforce a law. See App. 68a (Bork, J., dissenting) ("[T]he Framers * * * did not conceive of the powers of elected representatives as apart from the powers of the electorate."). Nothing in the role established for it by the Constitution confers on Congress a special right to ensure, outside of the political process, that "its" laws are enforced. To the contrary, the "vest[ing] of legislative Powers" in Congress (Art. I, § 1) authorizes it simply "to prescribe general rules for the government of society." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (Marshall, C.J.). Congress does not have any continuing, quasi-proprietary right in statutes after they have been enacted. At that point, it is the President's responsibility under Article II, Section 3 to "take Care" that the laws are "faithfully executed." See *Allen v. Wright*, slip op. 23. Should Congress wish to take issue with the President's performance, it is free to do so "through its committees and the 'power of the purse.'" *Laird v. Tatum*, 408 U.S. 1, 15 (1972). Its "abstract injury" (*Reservists*, 418 U.S. at 217 (footnote omitted)), however, is insufficient to enlist the aid of the federal judiciary as well.

c. That respondents' injury is couched in terms of the Pocket Veto Clause rather than the President's duty faithfully to execute the laws is immaterial. The Pocket Veto Clause is part of the process set forth in Article I, Section 7 of the Constitution for the enactment of legislation. Section 7, by "prescrib[ing] and defin[ing] the respective functions of the Congress and of the Executive in the legislative process" (*INS v. Chadha*, 462 U.S. 919, 945 (1983)), establishes a "rule of recognition"¹⁸ for identifying those pronouncements that have become laws of the United States. The consequence of a failure to

¹⁸ H.L.A. Hart, *The Concept of Law* 92 (1961).

comply with Section 7 is not an "injury in fact" to the President or to Congress or its members, but simply that a bill not properly presented does not become law or that one not properly vetoed does become law.¹⁹

This analysis is confirmed by an examination of the Pocket Veto Clause itself. That Clause does not impose any duty upon the President or Congress to act or to refrain from acting. The President did nothing in this case to "exercise" the pocket veto—he simply declined to sign H.R. 4042 or to return it to Congress with a veto message. See *The Pocket Veto Case*, 279 U.S. at 676-677 ("use of the term 'pocket veto' * * * is misleading * * * in that it suggests that the failure of the bill * * * is necessarily due to the disapproval of the President and the intentional withholding of the bill from reconsideration"). If the court of appeals was correct on the merits, then H.R. 4042 became a law; if petitioners are correct, then it did not. See *id.* at 673, 674. That is a question properly answered only in an action brought by a private person directly affected by the status of the particular bill in question.²⁰

¹⁹ In *Chadha*, for example, the President did not claim that he was injured in fact by the legislative veto and was therefore entitled to a declaration or injunction forbidding its use. Rather, the case arose in an adversary context between the Immigration and Naturalization Service and an alien facing deportation (462 U.S. at 939). While the Senate and House were permitted to intervene to defend the constitutionality of a statute whose validity was challenged by the INS (*id.* at 930 n.5), nothing in the case suggests that Congress would have had standing to bring its own action alleging that the INS, for whatever reason, had not deported Chadha as statutorily required, or (as in this case) seeking, wholly apart from an actual controversy involving any private person, an abstract declaration of the validity of a statute.

²⁰ The mere fact that some bills, such as H.R. 4042, may not affect private rights in a manner giving any person standing to obtain a judicial declaration of their validity is plainly insufficient to confer standing on respondents. See *Valley Forge Christian College*, 454 U.S. at 489; *Reservists*, 418 U.S. at 227 ("The assump-

The President's inaction in no sense deprived Congress of its "participation in the lawmaking process" (App. 9a), for Congress fulfilled that function when it presented the bill to the President for his consideration. Nor did it "nullif[y] [the plaintiffs'] original vote[s] in favor of the legislation" (*id.* at 8a), which were fully effective in achieving passage of H.R. 4042 and its presentment to the President. At that point, the legislative function was fulfilled, and Congress and its members retained only an undifferentiated interest in seeing the bill enforced, as to which they plainly lacked standing for the reasons already discussed.²¹

3. Finally, the court of appeals seriously erred in deciding that the Pocket Veto Clause is inapplicable to intersession adjournments of Congress so long as Congress has designated agents to receive veto messages from the President and there would be no undue delay before consideration of such messages on Congress's return. Under the Pocket Veto Clause, a bill neither signed nor returned by the President does not become law if "the Congress by their Adjournment prevent its Return." In *The Pocket Veto Case*, the Court held that an intersession adjournment "prevented the President, within the meaning of the constitutional provision, from returning [the bill in question] * * * and that [the bill therefore] did not become law" (279 U.S. at 691-692). That decision is controlling here.

tion that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.").

²¹ Even if it might in some circumstances be permissible for courts to referee an abstract dispute between the legislative and executive branches, respondents—the Senate and individual members and officers of the House—lack standing to represent Congress as a whole, which could be the only permissible party to assert injury to that body's official prerogatives. See generally *Goldwater v. Carter*, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring in the judgment).

a. In *The Pocket Veto Case*, the Court noted that, "commencing with President Madison's administration * * *, all the Presidents who have had occasion to deal with this question have adopted and carried into effect the construction * * * that they were prevented from returning the bill to the House in which it had originated by the adjournment of the session of Congress; and that this construction ha[d] been acquiesced in by both Houses of Congress until 1927" (279 U.S. at 691). This "[l]ong settled and established practice," the Court stated, "is a consideration of great weight in a proper interpretation of constitutional provisions of this character" (*id.* at 689). As the court of appeals correctly noted, the historical understanding that this Court described has continued since *The Pocket Veto Case* was decided (App. 41a-42a):

Beginning with President Jefferson and continuing through President Nixon, twenty-five of the thirty Presidents who have exercised the pocket veto power at all have done so during intersession adjournments. In each of these pocket vetoes—272 in all—Congress has acquiesced.

The President's treatment of H.R. 4042 thus is consistent with long-settled practice and, as we show below (pages 24-28), with the constitutional text and this Court's precedents. There is no reason to accept Congress's invitation to depart from the understanding of the Pocket Veto Clause "accepted through most of the history of the Republic" (App. 41a).

The court of appeals concluded that "the past practice of the Executive" and "Congress's acquiescence in that practice" are irrelevant because "conditions [are] markedly different" today (App. 42a). But the mere fact that the average duration of intersession adjournments has diminished somewhat over the years (see *id.* at 33a) is no reason to disregard the consistent historical view of

the constitutional provision. Cf. *Morrison-Knudsen Construction Co. v. Director, OWCP*, 461 U.S. 624, 635 (1983) (refusing to expand statute "because of 'recent trends'"). In *The Pocket Veto Case*, this Court recognized Congress's obligation "to proceed *immediately* with its reconsideration" of bills returned by the President (279 U.S. at 685 (emphasis added)). Congress has similarly understood that "[t]he Constitution contemplates that *simultaneously* with the return of the bill to the House in which it originated the House may take up the matter for consideration" (*id.* at 686 n.11, quoting Cong. Globe, 40th Cong., 2d Sess. 1373 (1868) (emphasis added)). See also *The Pocket Veto Case*, 279 U.S. at 688 n.11, quoting Cong. Globe, 40th Cong., 2d Sess. 1373 (1868) ("The whole clause looks to speedy action, at all events, upon objections made by the President * * *"). Thus, the "usual but not invariable rule [is] that a bill returned with the objections of the President *shall be voted on at once*." W. Brown, *Constitution, Jefferson's Manual, and Rules of the House of Representatives*, H.R. Doc. 96-398, 96th Cong., 2d Sess. 45 (1981) (emphasis added). By requiring use of the return veto in circumstances such as the nine-week adjournment in this case, the court of appeals' decision frustrates the historical and practical understanding that the President's veto messages are entitled to immediate consideration by Congress.

b. The court of appeals' decision is also directly contrary to *The Pocket Veto Case*. At issue in *The Pocket Veto Case*, as in this case, was the status of a bill neither signed by the President nor returned with a veto message, where Congress was in adjournment between sessions on the tenth day (Sundays excepted) following presentment of the bill. The "crucial question" decided by the Court in *The Pocket Veto Case* was "whether, in order to return the bill to the House in which it originated, within the meaning of the constitutional provision, it is necessary * * * that it be returned to the House itself while it is in session, or whether * * * it may be

returned to the House, although not in session, by delivering it to an officer or agent" (279 U.S. at 681). The Court found "no substantial basis for the suggestion that although the House in which the bill originated is not in session the bill may nevertheless be returned * * * by delivering it, with the President's objections, to an officer or agent of the House, * * * even if authorized by Congress itself" (*id.* at 683-684). The Court concluded (*id.* at 684-685):

[I]t was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual * * *.

Accordingly, *The Pocket Veto Case* establishes that the President is prevented from returning a bill with a veto message, within the meaning of the Pocket Veto Clause, when Congress has adjourned between sessions.

c. In departing from this rule, the court of appeals misread the Court's decision in *Wright v. United States*, 302 U.S. 583 (1938). In *Wright*, the Senate, which was the originating house, was in a three-day, unilateral, intrasession recess when the President's time for returning the bill in question expired. The Court addressed the contention that the bill, which had during the recess been returned by the President with a veto message, nonetheless became law through an anomaly in the Constitution, i.e., a situation in which the President was completely deprived of his veto power because a return veto was ineffective and the Pocket Veto Clause was inapplicable. Not surprisingly, the Court declined to interpret the Consti-

tution to create such a restriction on the President's opportunity to veto legislation that is not in his judgment worthy of enactment.

The Court in *Wright* first held that the Pocket Veto Clause is by its terms inapplicable when a single house of Congress, rather than "the Congress," has adjourned (302 U.S. at 587-589). The Court then considered whether there is "any practical difficulty in making the return of [a] bill" during brief recesses like the Senate's in that case (*id.* at 589). It concluded that no such difficulties are present and, accordingly, that a "bill does not become a law if the President has delivered the bill with his objection to the appropriate officer of [the originating] House" when "the Congress has not adjourned and th[at] House * * * is in recess for not more than three days" (*id.* at 598). Taken together, the Court's two holdings in *Wright* establish only that, when the Pocket Veto Clause is inapplicable because the Congress is not in an adjournment, the President may effect a veto by returning the bill with his objections to an agent of the originating house.

Wright does not disturb the rule of *The Pocket Veto Case*. The Court in *Wright* took great pains to distinguish the brief, one-house intrasession recess there at issue from the intersession adjournment of Congress considered in *The Pocket Veto Case* (302 U.S. at 593-596). Moreover, the Court's discussion in *Wright* of the practical considerations surrounding the return of veto messages to congressional agents has no bearing on the applicability of the Pocket Veto Clause—the Court had already held that the Clause was immaterial because "the Congress" had not adjourned. The Court quite plainly rested that holding on the text of the Pocket Veto Clause (*id.* at 587) rather than on a view that return of a veto message is not "prevented" within the meaning of the Clause when an agent is available to receive it. Nor does *Wright* limit the holding of *the Pocket Veto Case* to situations where a congressional agent, even if available, has not been duly

authorized to accept veto messages: as Justice Stone pointed out, the agent in *Wright* had no more authority than the one in *The Pocket Veto Case* (302 U.S. at 599-600 (opinion concurring in the judgment)).

d. The court of appeals' decision not only departs from this Court's precedents, it is inconsistent with the constitutional text and "leave[s] in confusion and doubt the meaning and effect of the veto provisions of the Constitution, the certainty of whose application is of supreme importance" (*Wright*, 302 U.S. at 599 (Stone, J., concurring in the judgment)). The Pocket Veto Clause applies when "Congress by their Adjournment prevent [a bill's] Return" (emphasis added). The court of appeals' decision virtually reads the emphasized language out of the Clause: had the Framers been concerned merely with "whether any obstacle to exercise of the President's qualified veto is posed" (App. 45a (footnote omitted)), it would have been incongruous for them to have referred to adjournments at all. Indeed, the court of appeals admitted that its reading is contrary to the available evidence of the Framers' intent (*id.* at 40a-41a).²²

Remarkably, the court of appeals refused (App. 45a) to establish a clear line for determining when the Pocket Veto Clause is applicable, even though it recognized (*id.* at 38a) that "clear rules respecting the pocket veto are vitally necessary." By rejecting the well-defined rule that the Pocket Veto Clause applies when "the Congress"

²² The court of appeals relied (App. 44a) on *The Pocket Veto Case*, 279 U.S. at 680, for the proposition that the Pocket Veto Clause is applicable only to those adjournments that "prevent[]" the return of bills. That much of course is true; but what the court of appeals failed to appreciate is that this Court squarely held in *The Pocket Veto Case* that intersession adjournments *do* prevent the return of bills within the meaning of the Clause. The mere use of the word "prevent[]" hardly requires that it bear the result-oriented construction that the court of appeals adopted in contravention of *The Pocket Veto Case* and the Framers' intent. *Cf. INS v. Chadha, supra*.

has adjourned in favor of an ad hoc examination of whether the adjournment at issue occasioned "*undue* delay or uncertainty" (*id.* at 32a (emphasis added)), the court of appeals' decision invites endless litigation over whether "the conditions surrounding th[e] type of adjournment" at issue in each particular case gave rise to "any obstacle to exercise of the President's qualified veto" (*id.* at 45a). Such litigation, which would keep bills "in a state of suspended animation * * *, with no certain knowledge on the part of the public" as to their status (*The Pocket Veto Case*, 279 U.S. at 684), would serve the purposes of the constitutional provision poorly indeed.

This Court's decisions in *The Pocket Veto Case* and *Wright* establish a standard that is faithful to the constitutional text and the intent of its Framers. If, contrary to prior experience (see pages 23-24, *supra*), the Pocket Veto Clause now stands as an obstacle to effective assertion of the legislative will, Congress is free to avail itself of the constitutionally prescribed amendment process. By the same token, however, the court of appeals' evident belief that the Pocket Veto Clause is no longer "efficient, convenient, and useful in facilitating functions of government" (*INS v. Chadha*, 462 U.S. at 944) creates no call for the "convenient shortcut" (*id.* at 958) of judicial amendment of the Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summarily vacating the judgment below and remanding with directions to dismiss the action as moot.

Respectfully submitted.

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NOVEMBER 1985

85-781 (2)

Supreme Court, U.S.

FILED

NOV 5 1985

No.

JOSEPH F. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

**FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, and RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS**

v.

MICHAEL D. BARNES, ET AL.

**APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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1a

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 84-5155

**MICHAEL D. BARNES, individually and as a member
of U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL., APPELLANTS**

v.

**RAY KLINE, individually and
in his capacity as Administrator,
General Services Administration, ET AL.**

**Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 84-00020)**

Argued June 4, 1984

Decided August 29, 1984

Opinions Filed April 12, 1985

Before: ROBINSON, *Chief Judge*, BORK, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge MCGOWAN*.

Separate dissenting opinion filed by *Circuit Judge BORK*.

MCGOWAN, *Senior Circuit Judge*: This appeal from the District Court¹ requires us to determine when legislation presented to the President for his review is subject to a "pocket veto" under Article I, section 7, clause 2 of the United States Constitution. That clause provides, in part, that if the President disapproves of a bill but fails to return it to its originating house, with his objections noted, within ten days after presentment to him, the bill becomes a law "unless the Congress by their adjournment prevent its Return, in which Case it shall not be a law." The precise issue at stake is whether adjournment of the Ninety-eighth Congress at the end of its first session "prevented" return of a bill presented to the President on the day of adjournment and thus created an opportunity for a pocket veto of that bill.

Appellants are thirty-three individual members of the House of Representatives,² joined by the United

¹ Barnes v. Carmen, 582 F. Supp. 163 (D.D.C. 1984).

² They have sued both in their individual capacity and as members of the House. Thirty-one of the thirty-three mem-

States Senate and the Speaker and bipartisan leadership of the House of Representatives.³ Appellees are Ray Kline, Acting Administrator of General Services,⁴ and Ronald Geisler, Executive Clerk of the White House. In the District Court, appellants sought declaratory and injunctive relief that would have nullified the President's attempted pocket veto in this case and required appellees to deliver and publish as law the bill that forms the subject matter of this litigation. On cross-motions for summary judgment, the court found for appellees on the ground that intersession adjournments⁵ inherently

bers voted in favor of the legislation in question; two took no part in the measure's final adoption on the floor. 582 F. Supp. at 164.

³ The Senate intervened in the District Court pursuant to FED. R. CIV. P. 24(a)(1) and 2 U.S.C. §§ 288b(c), 288e(a), 288f(a) (1982). The resolution directing Senate Legal Counsel to undertake intervention was jointly sponsored by Senators Howard Baker and Robert Byrd, Majority and Minority Leaders, respectively, of the Senate. S. Res. 313, 98th Cong., 2d Sess. (1984); 130 CONG. REC. S223-24 (daily ed. Jan. 26, 1984) (remarks of Sen. Baker). The Speaker of the House of Representatives and the House Bipartisan Leadership Group, which includes the Majority and Minority Leaders and Whips, intervened in their official capacities pursuant to FED. R. CIV. P. 24(a)(2), or in the alternative under FED. R. CIV. P. 24(b)(2). All applications of intervention were granted without opposition in the District Court, 582 F. Supp. at 164 n.1.

⁴ Mr. Kline has been substituted for his predecessor, Gerald P. Carmen, who was the General Services Administration defendant in the District Court.

⁵ "Intersession" adjournments separate the first and second sessions of each Congress, in contrast to "intrasession" adjournments (those within a session) and "final" adjournments (those at the end of a Congress).

prevent the return of disapproved legislation. *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984). Our judgment was announced by order entered August 29, 1984, reversing the District Court's decision and remanding the case with instructions to enter summary declaratory judgment for appellants. The same order noted that this opinion would follow.

I

On September 30, 1983, the House of Representatives passed H.R. 4042, 98th Cong., 1st Sess. (1983). 129 Cong. Rec. H7777 (daily ed. Sept. 30, 1983). The purpose of the bill was to renew, for the fiscal year ending September 30, 1984, the human rights certification requirements of the International Security and Development Co-operation Act of 1981 ("ISDCA"), Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555-57 (1981), *reprinted as amended* in 22 U.S.C. § 2370 note, at 460-61 (1982) (Restrictions on Military Assistance and Sales to El Salvador).⁶ On November 17th, the Senate passed the bill without amendment. 129 Cong. Rec. S16,468 (daily ed. Nov. 17, 1983). The following day, the Speaker of House and the President Pro Tempore of the Senate signed the bill, *see* 1 U.S.C. § 106 (1982), and the

⁶ Those requirements made semi-annual certification by the President that El Salvador is progressing in protecting human rights a pre-condition to continued military aid to the government of that country. ISDCA § 728(b)-(e). H.R. 4042 sought to extend those requirements through fiscal year 1984 or until Congress enacted new legislation governing the subject. H.R. 4042, 98th Cong., 1st Sess., 129 CONG. REC. H7777 (daily ed. Sept. 30, 1983). Under the bill, the President was required to make certification on January 16, 1984, and again 180 days thereafter. *See* Joint Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant at 5 n.2.

House Committee on Administration presented it to the President for his consideration. 129 Cong. Rec. H10,663 (daily ed. Dec. 14, 1983).

On the same day, November 18th, the Ninety-eighth Congress adjourned its first session *sine die*,⁷ and agreed by joint resolution to convene for its second session on January 23, 1984.⁸ By standing rule of the House of Representatives, the Clerk of the House is authorized to receive messages from the President whenever the House is not in session. *See* Rules of the House of Representatives, Rule III, cl. 5, *reprinted in* H.R. Doc. No. 271, 97th Cong., 2d Sess. 318 (1983); 129 Cong. Rec. H22 (daily ed. Jan. 3, 1983). Prior to adjourning, the Senate conferred similar, temporary authority on the Secretary of the Senate. 129 Cong. Rec. S17,192-93 (daily ed. Nov. 18, 1983).

The President took H.R. 4042 under consideration, but neither signed the bill into law nor returned it to the House of Representatives with a veto message. Instead, on November 30th, he issued a statement announcing that he was withholding his approval of the bill. 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30,

⁷ 129 CONG. REC. H10,469, S16,779 (daily ed. Nov. 18, 1983). Although the duration of a *sine die* adjournment is by definition unspecified, Congress in this instance followed its usual end-of-session practice of vesting joint authority in the Speaker of the House and the Majority Leader of the Senate to reassemble the Congress "whenever, in their opinion, the public interest shall warrant it." H. Con. Res. 221, § 2, 98th Cong., 1st Sess., 129 CONG. REC. H10,105 (daily ed. Nov. 16, 1983); *id.* at S16,858 (daily ed. Nov. 18, 1983).

⁸ H.J. Res. 421, 98th Cong., 1st Sess., 129 CONG. REC. H10,105 (daily ed. Nov. 16, 1983); *id.* at S16,858 (daily ed. Nov. 18, 1983). The Ninety-eighth Congress convened its second session as scheduled on January 23, 1984.

1983). Taking the position that the President's action constituted a valid exercise of the pocket veto power, appellees failed to deliver and publish H.R. 4042 as a public law of the United States.

Five weeks later on January 4th, appellants filed suit in the District Court to overturn the President's attempted pocket veto as constitutionally invalid and to compel the delivery and publication of H.R. 4042 as law. After the District Court advanced and consolidated the trial on the merits with appellants' application for preliminary relief, the Senate and the Speaker and bipartisan leadership of the House joined the action as intervenors likewise opposed to the President's action. *See supra* note 3.

In the District Court, appellants contend: (1) that adherence to constitutional purpose requires limiting the opportunity for a pocket veto to final adjournments between Congresses or to adjournments during which the houses of Congress have prevented return by failing to appoint agents to receive presidential messages during their absence; (2) that consequently President Reagan's failure to return H.R. 4042 to the House of Representatives within ten days of its presentment to him had resulted in the bill's becoming law under the Constitution; and (3) that appellees therefore are under an obligation to deliver and publish the bill as law pursuant to 1 U.S.C. §§ 106a, 112 (1982). In support of their position, appellants cited *Wright v. United States*, 302 U.S. 583 (1938), in which the Supreme Court held that no opportunity for a pocket veto arises when, on the tenth day after presentment, the originating house is in an intrasession adjournment of three days or fewer, and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), in which this circuit held *Wright* to

apply to all intrasession adjournments by one or both houses of Congress, as long as a congressionally authorized agent remains to receive veto messages from the President. The Legislative Branch argued that, because intersession and intrasession adjournments are indistinguishable under modern congressional practice, *Wright* should be further extended to intersession adjournments.

Appellees responded that the appointment of congressional agents to receive presidential messages while Congress is in adjournment has no constitutional significance, and that in any case the Supreme Court's ruling in the *Pocket Veto Case*, 279 U.S. 655 (1929), which upheld a pocket veto during an intersession adjournment of the Sixty-ninth Congress, squarely governs this case. Moreover, while agreeing with appellants that no practical difference exists today between intersession and intrasession adjournments, appellees argued that there is a constitutionally significant distinction between adjournments for three days or less and those for a longer period, as evidenced by Article I, section 5, clause 4, under which neither house may adjourn for more than three days without the consent of the other. Any adjournment of over three days would, according to appellees, create an opportunity for a valid pocket veto.⁹ Appellees contend that either construction of the congressional adjournment involved here—as an intersession adjournment or as one for more than three days—supports a finding that the President validly exercised his pocket veto power in this instance.

⁹ Appellants accordingly take the position that the merits aspect of *Kennedy v. Sampson* was incorrectly decided. *See* Brief for the Appellees at 57-63.

Accepting the first of the two alternative arguments raised by appellees, the District Court found the *Pocket Veto* decision "the only case directly in point" and concluded that "[u]nless and until the Supreme Court reconsiders the rule of that case," intersession adjournments would be deemed inherently to prevent the return of disapproved legislation to Congress. 582 F. Supp. at 168. Summary judgment was accordingly entered for appellees, whereupon the Legislative Branch filed its present appeal to this court.¹⁰

II

Before examining the merits of this dispute, we address the question of whether appellants have standing to come before a federal court for resolution of the claims they press in the present litigation. In *Kennedy v. Sampson*, this court held that a single United States Senator had standing to challenge an unconstitutional pocket veto on the ground that it had nullified his original vote in favor of the legislation in question.¹¹ At the same time, the court stated

¹⁰ Since the appeal was filed, Congress passed, and the President signed, a supplemental appropriations bill, Pub. L. No. 78-332, which approved disbursement of certain funds for military assistance to El Salvador upon the President's meeting certification requirements that differ somewhat from those imposed by H.R. 4042. See Supplemental Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant. Because the new law supersedes H.R. 4042 only with respect to the particular funds appropriated thereunder, and because Congress may make further appropriations to which the certification requirements of H.R. 4042 might apply if that bill became law, a live controversy remains for us to resolve.

¹¹ 511 F.2d at 433-36. The Senator himself characterized the injury as a deprivation of his constitutional prerogative of voting to override the President's veto. *Id.* at 434 n.13. The

that either house of Congress clearly would have had standing to challenge the injury to its participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under Article I, and improper exercise of the pocket veto power infringes that right more directly than it does the right of individual members to vote on proposed legislation. 511 F.2d at 434-36 & nn. 13 & 17.

In the present action, the thirty-three individual Representatives allege an injury identical to that of the individual lawmaker in *Kennedy v. Sampson*. The House Bipartisan Leadership Group and the United States Senate assert an injury of the second, more direct type described in that opinion, that is, an injury to the lawmaking powers of the two houses of Congress.¹² Under the law of this circuit,¹³ therefore all the appellants are properly before this court.

court noted that, strictly speaking, the opportunity to override never arose because the President had not attempted a return veto. *Id.* Under either characterization, however, the result of the President's inaction was a diminution of the Senator's power to participate in the enactment of legislation through voting on proposed or returned bills. See *id.* at 435-36.

¹² The Senate has intervened in this action to protect "a direct constitutional interest in the efficacy of its legislative action," see Motion of the United States Senate to Intervene at 2, *Barnes v. Carmen*, 582 F. Supp. 163 (D.D.C. 1984), while the Speaker and bipartisan leadership of the House have intervened "to fulfill their time-honored duty of asserting the rights and privileges of the House of Representatives," see Motion of the Hon. Thomas P. O'Neill, Jr., et al., to Intervene at 4, *Barnes v. Carmen*.

¹³ See also *Moore v. United States House of Representatives*, 733 F.2d 946, 950-54 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 8, 1985) (No. 84-389) (holding that individual members of House of Representatives have standing to sue

In a wide-ranging dissent from this panel's decision on standing, Judge Bork propounds the view that neither individual congressmen nor the houses of Congress may challenge in federal court the President's invocation of the pocket veto power. More broadly, the dissent reads Article III to bar *any* governmental official or body from pursuing in federal court any claim, the gravamen of which is that another governmental official or body has unlawfully infringed the official powers or prerogatives of the first. The dissent contends that previous decisions of this court permitting congressional standing do not bind this panel because they are the result of the court's failure to give proper regard to the underpinnings of Article III's standing requirement, namely, the separation of powers. While we are largely content to let this court's opinions speak for themselves, we wish to make clear the error in the dissent's understanding of Article III and the doctrine of separation of powers.

It is beyond contention that Article III's standing requirement is intended to "limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)); accord *Allen v. Wright*, 104 S. Ct. 3315, 3324-25 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). It is also indisputable

for declaration that a tax law was unconstitutional because it originated in the Senate rather than the House).

that in matters involving another branch of the government, the courts must be especially wary of overstepping their proper role, for "repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either." *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring); accord *Valley Forge*, 454 U.S. at 473-74; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974).

Nonetheless, when a proper dispute arises concerning the respective constitutional functions of the various branches of the government, "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Courts may not avoid resolving genuine cases or controversies—those "of a type which are traditionally justiciable"—simply because one or both parties are coordinate branches. *United States v. ICC*, 337 U.S. 426, 430 (1949). As Justice Rehnquist has stated:

Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Valley Forge, 454 U.S. at 474. Thus, Supreme Court precedent contradicts the dissent's sweeping view that Article III bars any governmental plaintiff from

litigating a claim of infringement of lawful function. See *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2778, 2780 (1983) (Congress's intervention in litigation over the constitutionality of the one-house veto established requisite concrete adverse-ness); *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977) (indicating that incumbent President would "be heard to assert" claim that Presidential Recordings and Materials Preservation Act unconstitutionally impinged upon the autonomy of the Executive Branch); *National League of Cities v. Usery*, 426 U.S. 833, 837 & n.7 (1976) (cities and states had standing to sue federal government over alleged infringement of "'a constitutional prohibition' running in favor of the States as States"), overruled on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985) (Nos. 82-1913 & 82-1951); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 154-56 (1953) (Secretary of Interior had standing to press a claim against the Federal Power Commission for alleged infringement of the Secretary's role); *Coleman v. Miller*, 307 U.S. 433 (1939), discussed *infra* pp. 14-15; see also *Goldwater v. Carter*, 444 U.S. 996 (1979) (suit by congressional plaintiffs claiming an injury to their constitutionally mandated powers was dismissed on ripeness and political question grounds, but not on standing grounds, despite lower court opinions addressing standing issue).¹⁴

¹⁴ *Massachusetts v. Mellon*, 262 U.S. 447 (1923), heavily relied upon by the dissent, is in no respect to the contrary. That case involved a Tenth Amendment challenge by Massachusetts to a federal statute that established certain standards for reducing maternal and infant mortality and provided for

In congressional lawsuits against the Executive Branch, a concern for the separation of powers has led this court consistently to dismiss actions by in-

grants of funds to states complying with the standards. The Court stated:

[T]he complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States *by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent*; and it is plain that that question, as it is thus presented, is political and not judicial in character

Id. at 483 (emphasis added). The Court was moved to dismiss the suit, not because it was brought by a state, but because no invasion of any state's power had occurred. The Court distinguished the case from, among other cases, *Missouri v. Holland*, 252 U.S. 416 (1920), a suit brought by a state in which "there was an invasion, by acts done and threatened, of the quasi-sovereign right of the State to regulate the taking of wild game within its borders." 262 U.S. at 482. The Court concluded: "No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the statute and this Court is . . . without authority to pass abstract opinions upon the constitutionality of acts of Congress." *Id.* at 485 (emphasis added). Clearly, then, *Massachusetts v. Mellon* did not establish that governmental officials and entities necessarily and always lack standing to raise claims of infringement of lawful functions. Rather, the case explicitly leaves open the possibility of suit by a state when "rights of the State falling within the scope of the judicial power" are at stake, a possibility later to become an actuality in, e.g., *National League of Cities*, *supra*.

Similarly misplaced is the dissent's reliance on *Allen v. Wright*, *supra*. In *Allen*, the Court held that parents of black school children lacked standing to bring a suit against the I.R.S. alleging that I.R.S. regulations governing the tax-exempt status of racially discriminatory private schools interfered with the ability of the plaintiffs' children to obtain an education in desegregated schools. The Court reiterated the

dividual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process. See, e.g., *Moore v. United States House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984), cert. denied, 53 U.S.L.W. 3483 (U.S. Jan. 8, 1985) (No. 84-389); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); *Harrington v. Bush*, 553 F.2d 190, 214 (D.C. Cir. 1977). Similarly, in *Goldwater v. Carter*, 444 U.S. 996 (1979), Justice Powell, concurring in the judgment, would have dismissed as unripe a claim by several members of Congress that the President's action in terminating a treaty infringed their constitutional role: "Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual controversy between the Legislative and Executive Branches." *Id.* at 998. As Justice Powell also stated, however, a dispute between Congress and the President is ready for judicial review when "each branch has taken action asserting its constitutional authority"—when, in short, "the political branches reach a constitutional impasse." *Id.* at 997.

There could be no clearer instance of "a constitutional impasse" between the Executive and the Legislative Branches than is presented by this case. Con-

traditional standing criteria—concrete injury directly traceable to defendant's conduct and remediable by a favorable decision—and, echoing *Valley Forge* and *Warth v. Seldin*, *supra*, emphasized that those criteria are grounded in, and are to be applied with reference to, the principle of separation of powers. 104 S. Ct. at 3325. The case has nothing to do with "governmental standing," nor does the Court mention the subject.

gress has passed an Act; the President has failed to sign it, and has declared it not to be a law; Congress has challenged the validity of that declaration. The court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the executive branch. And it cannot be said that Congress is asking for an advisory judicial opinion on a hypothetical question of constitutional law; Congress is seeking a declaration, not about the legal possibility of pocket vetoes during intersession adjournments, but about the validity of a particular purported veto. Congress has raised a claim that is founded on a specific and concrete harm to its powers under Article I, section 7—a "[d]eprivation of a constitutionally mandated process of enacting law" that has actually occurred. *Moore*, 733 F.2d at 951; see *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1381-82 (D.C. Cir. 1984); *Dennis v. Luis*, 741 F.2d 628, 630-31 (3d Cir. 1984). That such injury is judicially cognizable has been clear since the Supreme Court held in *Coleman v. Miller*, 307 U.S. 433 (1939), that state legislators had standing to litigate the question of whether the legislature had ratified a constitutional amendment, within the meaning of Article V: "We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect" ¹⁵ As the Executive Branch itself

¹⁵ *Id.* at 438-42. That *Coleman* cannot fairly be distinguished on the ground that it concerned state, rather than federal, legislators' standing is clear from the Court's emphasis of "the legitimate interest of public officials and administrative com-

missions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties." *Id.* at 442.

Nor are we persuaded by the dissent's argument that *Coleman*'s finding of cognizable injury was premised on a grant of standing by the state supreme court below and thus is inapposite to cases originating in federal court. A pair of earlier Supreme Court cases, cited in *Coleman*, is instructive in this respect. In *Fairchild v. Hughes*, 258 U.S. 126 (1922), a citizen of New York brought suit in the Supreme Court of the District of Columbia to challenge the effectiveness of the ratification of the Nineteenth (women's suffrage) Amendment. The court found the plaintiff to assert no judicially cognizable injury, and dismissed the suit. The same day, in *Leser v. Garnett*, 258 U.S. 130 (1922), the Court reached the merits of a similar challenge initiated in state court by a Maryland citizen. The fact that one case was brought in federal court while the other originated in state court, however, does not account for the differing results. The *Fairchild* Court stated the basis for its jurisdictional holding as follows:

[P]laintiff is not an election officer; and the State of New York, of which he is a citizen, had previously amended its own constitution so as to grant the suffrage to women and had ratified this Amendment. Plaintiff has only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit to secure by indirection a determination whether a statute if passed, or a constitutional amendment about to be adopted, will be valid.

258 U.S. at 129-30 (citations omitted). By contrast, in *Leser*, the Court pointed out that "the constitution of Maryland limits the suffrage to men," 258 U.S. at 135, and the "Legislature of Maryland had refused to ratify" the Nineteenth Amendment. *Id.* at 136. The plaintiff in *Leser* thus could correctly claim that his vote would be diluted by adoption of the Nineteenth Amendment, whereas in *Fairchild*, that same claim [*sic*] clearly false. That difference, we think, provides a more plausible basis for distinguishing the two cases than does the

concedes, Congress clearly has standing to litigate the specific constitutional question presented.¹⁶

The dissent believes, however, that the separation of powers would be better served in this case by remitting the question involved to a political solution, rather than a judicial one. The dissent understandably leaves unspecified the precise course of events contemplated: a "political solution" would at best entail repeated, time-consuming attempts to reintro-

difference between the respective courts in which the suits originated.

Similarly, we believe, the *Coleman* Court thought *Leser* a "controlling authority," 307 U.S. at 441, not because both cases had come up from state courts, but rather because the plaintiffs in both asserted injury to their legal interest in an effective franchise. The majority stated: "The interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case." 307 U.S. at 441. And Justice Frankfurter, writing separately, characterized the majority opinion thus: "The right of the Kansas senators to be here is rested on recognition by *Leser v. Garnett*, 258 U.S. 130, of a voter's right to protect his franchise." 307 U.S. at 469. See also *Dyer v. Blair*, 390 F. Supp. 1291, 1397 n.12 (N.D. Ill. 1975) (three-judge court, per Stevens, J.) (reading *Coleman* as direct support for granting legislators standing to pursue in federal court claims of infringement of official role).

¹⁶ The concession was in terms based on the participation in this case by a single house of Congress, namely the Senate. See Tape Recording of Oral Argument at 204-11. Similarly, in *Kennedy v. Sampson*, 511 F.2d at 434, the Executive Branch noted that either or both houses would have standing to challenge a purported pocket veto. While, as the dissent correctly observes, parties may not create jurisdiction by mere stipulation, an interpretation of Article III's "case or controversy" requirement by a coordinate branch of the federal government must not be wholly disregarded.

duce and repass legislation, and at worst involve retaliation by Congress in the form of refusal to approve presidential nominations, budget proposals, and the like. That sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case. To quote again from Justice Powell's opinion in *Goldwater*:

Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell v. McCormack*, [395 U.S. 486, 548 (1969)]. . . . The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "to say what the law is." *United States v. Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

Goldwater, 444 U.S. at 1001 (Powell, J., concurring in the judgment). By defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers. We turn, therefore, to the merits of this dispute.

III.

The respective roles of Congress and the President in the enactment of legislation are set forth in Article I, section 7, clause 2 of the Constitution, the first of the presentment clauses, which provides as follows:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a law.

Thus, once a bill has been passed by both houses of Congress and presented to the President, he has ten days (not including Sundays) in which he may either sign the bill into law or return it to the originating house with his objections noted. If at the end of the time allotted he has done neither, the bill automatically becomes law as long as Congress has not by its adjournment prevented the President from returning the bill. If Congress's adjournment has prevented return, however, the bill automatically expires, in what has come to be known as a "pocket veto."

The question we confront is whether H.R. 4042 became law when the President failed to return it to the House of Representatives (where it originated) within the allotted time, or whether the bill

expired because return was prevented by Congress's having adjourned its first session *sine die* on the day of presentment of the bill. We believe this question has a clear answer. Given that both the House of Representatives and the Senate had expressly arranged before adjourning for an agent specifically authorized to receive veto messages from the President during the adjournment, it is difficult to understand how Congress could be said to have prevented return of H.R. 4042 simply by adjourning. Rather, by appointing agents for receipt of veto messages, Congress affirmatively *facilitated* return of the bill in the eventuality that the President would disapprove it.

The District Court held, however, that Congress's adjournment must be deemed to have "prevented" return of H.R. 4042 to the House, notwithstanding the existence of an agent authorized to receive the president's veto, and that H.R. 4042 thus expired through a pocket veto. The court rested the decision on its reading of the two Supreme Court opinions and the one opinion by this court that have construed the pocket veto clause. We believe that the District Court has misapplied these precedents and that its decision consequently frustrates the recognized purpose behind the pocket veto clause.

An examination of the Framers' intent with respect to the pocket veto clause is a neutral place to begin our analysis. Nowhere in the records of the Federal Convention of 1787, however, is there any reference to the concept of a pocket veto, or for that matter, to any of the specifics of the enactment process. Rather, the delegates were concerned with the broad issues of whether the President ought to have the power to veto legislation and, if so, whether

Congress should be able to override a presidential veto.¹⁷ On these issues, however, the records speak plainly and decisively. The delegates were firmly convinced that the President must have some power to revise legislative acts. But an absolute veto, they equally strongly believed, was dangerous and unwarranted. As James Madison put it: "To give such a prerogative would certainly be obnoxious to the temper of this country." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 100 (rev. ed. 1966).¹⁸ Thus, the delegates unanimously voted down an absolute veto, *id.* at 103, and eventually approved a resolution stating, "That the national Executive

¹⁷ See *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764, 2782 n.14 (1983) (citing historical sources). Also debated were the fraction of Congress necessary to override a veto and the question of whether the Judicial Branch ought to have a voice in the veto process. *Id.*

¹⁸ Other comments are also enlightening. Elbridge Gerry saw "no necessity for so great a control over the legislature as the best men in the Community would be comprised in the two branches of it." 1 M. FARRAND, *supra*, at 98. Similarly, Roger Sherman objected to "enabling any one man to stop the will of the whole" on the grounds that "[n]o one man could be found so far above all the rest in wisdom. . . . [W]e ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.* at 99. Benjamin Franklin, drawing on his experience with the government of Pennsylvania, voiced the specific fear that an absolute veto power would lead to a situation in which "[n]o good law whatever could be passed without a private bargain with [the Executive]." *Id.* at 99. Only two members—James Wilson and Alexander Hamilton—spoke in favor of an absolute negative. *Id.* at 98-100. Later, Hamilton himself eloquently defended the qualified veto as against the "more harsh" absolute veto power. See *THE FEDERALIST* No. 73 (A. Hamilton).

shall have a Right to negative any legislative Act, which shall not be afterwards passed, unless by two third Parts of each Branch of the national Legislative." 2 *id.* at 132.

The precise means of providing for a qualified presidential veto were devised by the Committee of Detail in what, with minor modifications,¹⁹ would ultimately constitute Article I, section 7, clauses 2 and 3 of the Constitution. The Committee's product reflects the recognition that to safeguard the qualified veto requires more than simply a set of rules directing Congress to present bills to the President and directing the President to approve or return such bills. For in the absence of any sanctions for violation of such rules, the President might simply decline to act upon a duly presented bill in order to block congressional reconsideration and thereby achieve through inaction what the Framers refused to permit him, namely, an absolute veto. The veto provision therefore mandates that a bill becomes law at the end of a ten-day period if not returned. Without more, however, Congress, which controls its own calendar,²⁰ could in turn vitiate the President's qualified veto by cutting short or entirely eliminating, through adjournment, the period of time allotted the President to return a bill with his objections. It is

¹⁹ The only significant modification undergone by the Committee's draft after being reported back to the convention was in the time allotted to the President to consider bills, which was increased from seven to ten days.

²⁰ The only exception to Congress's control over its own adjournments is in case of a disagreement between the two houses "with Respect to the Time of Adjournment," in which case the President "may adjourn them to such Time as he shall think proper." U.S. CONST. art. II, § 3.

that evil which the pocket veto clause forestalls by withholding the status of law from a bill whose return Congress prevented.²¹ The pocket veto clause thus is intended, not as an affirmative grant of power to the Executive, but rather as a limitation on the prerogative of Congress to reconsider a bill upon presidential disapproval, a limitation triggered when Congress "by their Adjournment prevent [the bill's] Return."

The manifest purpose of the pocket veto clause has guided application of the clause by the Supreme Court, as well as this circuit.²² In *The Pocket Veto*

²¹ See *Edwards v. United States*, 286 U.S. 482, 486 (1932); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 891, at 652 (5th ed. 1905) (1st ed. Cambridge 1833).

²² The recognition of the purpose of the veto provision also underlies the Supreme Court's treatment of an issue related to the pocket veto, namely, whether the President may sign a bill into law during an adjournment of Congress. In *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899), the Court held that an intrasession adjournment does not preclude presidential approval of a bill. The Court reasoned:

[I]n order that his refusal or failure to act may not defeat the will of the people, as expressed by Congress, if a bill be not approved *and* be not returned to the House in which it originated within that time, it becomes a law in like manner as if it had been signed by him. We perceive nothing in these constitutional provisions making the *approval* of a bill by the President a nullity if such approval occurs while the two Houses of Congress are in recess for a named time.

Id. at 454

Later, in *Edwards v. United States*, *supra*, the Court extended the reasoning and holding of *La Abra* to final adjournment of Congress. The Court stated:

[Continued]

Case, 279 U.S. 655 (1929), the earliest judicial discussion of the pocket veto clause, the Supreme Court confronted the issue of whether return of a bill to the Senate, where it originated, had been prevented when the Sixty-ninth Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President. Justice Sanford's opinion for the Court began by declaring that the term "adjournment" is used in the Constitution to refer to any occasion on which a house of Congress is not in session,

²² [Continued]

The last sentence of [Article 1, section 7, clause 2] clearly indicates two definite and controlling purposes: *First*. To insure promptness and to safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves; hence, the fixing of a time limit so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President. *Second*. To safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose.

286 U.S. at 486. Emphasizing that "[r]egard must be had to the fundamental purpose of the constitutional provision to provide appropriate opportunity for the President to consider the bills presented to him," *id.* at 493, the Court concluded:

No possible reason, either suggested by constitutional theory or based upon supposed policy, appears for a construction of the Constitution which would cut down the opportunity of the President to examine and approve bills merely because the Congress has adjourned. No public interest would be conserved by the requirement of hurried and inconsiderate examination of bills in the closing hours of a session, with the result that bills may be approved which on further consideration would be disapproved, or may fail although on such examination they might be found to deserve approval.

Id. at 493-94.

and dismissed the contention that the term refers solely to final adjournments of a Congress:

We think that under the constitutional provision the determinative question in reference to an "adjournment" is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that "prevents" the President from returning the bill to the House in which it originated within the time allowed.²³

An earlier case, the Court then noted, had held that a house of Congress is only constituted when a quorum of the membership is present. Because the veto provision specifies that the President must return a disapproved bill to its originating house, and because neither house was in session to receive delivery of the returned bill in that instance, the Court reasoned, return must be deemed to have been prevented.

Counsel for the House of Representatives had argued that, when the originating house is not in session, return may be made consistently with the constitutional provisions by delivering the bill, with the President's objections, to a proper agent of the house of origin, for subsequent delivery to that house when it reconvenes. Addressing itself to this argument, the Court noted first "the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and that there is no rule to that effect in either House." *Id.*

²³ 279 U.S. at 680. The Court also rejected the argument that "within ten days" refers to ten legislative days rather than ten calendar days. *Id.* at 679-80.

at 684. Moreover, the Court stated, "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate." The Court explained its position thus:

Manifestly it was not intended that, instead of returning the bill to the House itself, as required by the constitutional provision, the President should be authorized to deliver it, during an adjournment of the House, to some individual officer or agent not authorized to make any legislative record of its delivery, who should hold it in his own hands for days, weeks or perhaps months,—not only leaving open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all, but keeping the bill in the meantime in a state of suspended animation until the House resumes its sittings, with no certain knowledge on the part of the public as to whether it had or had not been seasonably delivered, and necessarily causing delay in its reconsideration which the Constitution evidently intended to avoid.

Id. at 684. Two concerns thus led the Court to believe that return to an agent of the original house would not adequately guarantee the President the opportunity to exercise his qualified veto: (1) delivery to an agent unauthorized to make an official record of delivery would engender uncertainty over whether timely return had in fact been made and thus whether the bill had or had not become law; and (2) such a return would be followed by lengthy delay before possible reconsideration by the originating house.

That the Court was not categorically denying the use of agents for delivery of veto messages was made clear in the Court's next, and last, encounter with the pocket veto clause. In *Wright v. United States*, 302 U.S. 583 (1938), the Court was called upon to determine the effectiveness of the President's return of a bill on the tenth day after presentment, during a three-day adjournment by the originating house only. The Court, speaking through Chief Justice Hughes, held that return to that house had not been prevented and that, therefore, delivery of the veto message to the Secretary of the Senate constituted an effective return.

In the first place, the Court noted, the Senate alone had adjourned, not "the Congress." Under the pocket veto clause, only an adjournment by "the Congress" can prevent return of a bill. *Id.* at 587. The Court then dismissed the notion that a bill cannot be returned by the President to the originating house if that house is in an intrasession adjournment. In this instance, the Court stated, there clearly was no "practical difficulty" in making return during the adjournment: "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill." *Id.* at 589-90. More importantly, the Court held that "[i]n returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. *The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.*" *Id.* at 589 (emphasis added).

As the *Wright* Court explained, the *Pocket Veto Case* was not to the contrary. Although the opinion

in the earlier case had expressed the view that return can only be made to a house that is actually assembled and not to an agent of the house, that view did not control this case because it was grounded in concerns that were wholly inapplicable to a brief, intrasession adjournment by the originating house:

In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the journal of the House, or that it will not be subject to reasonably prompt action by the House, is we think wholly chimerical.

Id. at 595. Given "the manifest realities of the situation," the Court held, return to an agent of the originating house was wholly effective. *Id.* Moreover, other adjournments might well not prevent return, although the Court declined to speculate as to which would or would not:

[C]ases may arise in which . . . a long period of adjournment may result. We have no such case

before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect.

Id. at 598. Thus, the Court expressly left open the possibility that its analysis would apply to render return to an agent effective in adjournments other than brief, one-house, intrasession adjournments. The Court, however, did not leave future courts without guidance in applying the veto provisions, for it made clear that those provisions are to be interpreted in the light of their "two fundamental purposes." *Id.* at 596. Although we have already set these forth at length, the *Wright* Court's formulation is important. On the one hand, the Court stated, the veto provisions are meant to ensure that "the President shall have suitable opportunity to consider the bills presented to him It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become laws if the adjournment of the Congress prevents their return." *Id.* (citation omitted). At the same time, the provisions ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Id.* The Court plainly stated: "*We should not adopt a construction which would frustrate either of these purposes.*" *Id.* (emphasis added).

Wright thus has twofold significance. First, and most important, its rule of construction requires a court to find that the President was truly deprived of his opportunity to exercise his qualified veto power before it may hold that return was "prevented"; a court that fails in this responsibility ends up sacrific-

ing, without justification, Congress's right to reconsider disapproved legislation. Second, *Wright* indisputably establishes that mere absence of the originating house does *not* prevent return if (1) there is an authorized agent to accept delivery of a veto message, and (2) such a procedure would not entail the delay and uncertainty justly feared by the Court in the *Pocket Veto Case*.

Ten years ago, in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), this circuit applied the teaching of *Wright* to hold that return is not prevented by an intrasession adjournment of any length by one or both houses of Congress, so long as the originating house arranged for receipt of veto messages. Dismissing the argument distinguishing *Wright* on the ground that only the originating house had adjourned in that case, this court stated: "To hold that a return veto is possible while the originating House alone is in brief recess but not when both Houses are in recess would embrace ritual at the expense of logic." *Id.* at 440 (footnotes omitted). As did the Court in *Wright*, this court demonstrated that the concerns that had led the Court in the *Pocket Veto Case* to disapprove return to a house not in session were simply unjustified in the context of the particular type of adjournment at issue. This court stated: "The modern practice of Congress with respect to intrasession adjournments creates neither of the hazards—long delay and public uncertainty—perceived in the *Pocket Veto Case*." *Id.* This court noted that, whereas at the time of the *Pocket Veto Case* "intersession adjournments of five or six months were still common," *id.* at 441 (footnote omitted), in the past decade Congress's intrasession adjournment's have typically consisted of "several recesses of ap-

proximately five days for various holidays and a summer recess (or recesses) lasting about one month." *Id.* (footnote omitted). Thus, this court concluded, "intrasession adjournment of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*." *Id.* (footnote omitted).

As to the concern for public uncertainty, this court stated:

Modern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen. The status of such a bill would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session.

Id. (footnote omitted). Indeed, the *Sampson* court observed, "[t]he only possible uncertainty about this situation arises from the absence of a definitive ruling as to whether an intrasession adjournment 'prevents' the return of a vetoed bill. Hopefully, our present opinion eliminates that ambiguity." *Id.* (footnote omitted).

In addressing ourselves to the issue in this appeal, we are of course cognizant of the fact that the *Pocket Veto Case* remains the only decision concerning the opportunity *vel non* for a pocket veto during an intersession adjournment. It was the District Court's belief that the *Pocket Veto Case* is therefore "the

only case directly in point." 582 F. Supp. at 168. Emphasizing that *Wright* did not purport to approve of delivery to agents during anything other than a three-day adjournment and that even *Sampson's* expansion of *Wright* did not reach beyond the line between intrasession and intersession adjournments, the District Court concluded that "neither *Wright* nor *Kennedy v. Sampson* give it license to depart from . . . *Pocket Veto*." *Id.* The court accordingly held, in essence, that intersession adjournments per se create an opportunity for a valid pocket veto.

We appreciate the District Court's desire to remain within the boundaries of precedent. We disagree, however, with its assessment of where those boundaries lie. Moreover, we believe that the District Court's holding fails to serve the essential purposes of the veto provisions.

The principle that we believe runs through *Pocket Veto* and *Wright* is a simple one: whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective *only* if, under the circumstances of that type of adjournment, such a procedure would not occasion undue delay or uncertainty over the returned bill's status. Thus, in *Pocket Veto*, the Court disapproved delivery to a congressional officer during intersession adjournments because of the length of such adjournments—then five months or longer—as well as the uncertainty resulting from the lack of any regularized procedure for recording returns. By the same token, the brief duration of the one-house adjournment in *Wright* as well as the continued functioning of the entire congressional apparatus led the Court to an opposite result in that case. Finally, in *Sampson*, this court, following *Wright's* lead, rea-

soned that the pocket veto clause did not apply to any intrasession adjournments, because they did not pose either of the problems cited in *Pocket Veto* to any greater degree than did the three-day adjournment in *Wright*.

Nor, we are convinced, do intersession adjournments pose either of those problems, for as appellees freely conceded before the District Court,²⁴ such adjournments do not differ in any practical respect from the intrasession adjournments at issue in *Wright* and *Kennedy v. Sampson*. To be sure, an intersession adjournment delays possible reconsideration of a return bill. But the delay is not substantial. In stark contrast to the five or six month intersession adjournments typical at the time of the *Pocket Veto Case*, intersession adjournments of the modern era have an average length of only four weeks, and are thus often even shorter than intrasession adjournments.²⁵ In this case, the adjournment was for nine weeks, somewhat longer than the average but still considerably shorter than the half-year-long adjournments common at the time of the *Pocket Veto Case*.²⁶

²⁴ 582 F. Supp. at 165-66.

²⁵ See Joint Brief for the Plaintiff-Appellants and Senate Intervenor-Appellant, apps. I & II, at 63-70.

²⁶ The adjournment in *Pocket Veto* differs from that at issue here, not only in its much greater duration, but also in that it divided two very different sessions of Congress, a "long" session and a "lame-duck" session. Before passage of the Twentieth Amendment in 1933, each Congress lasted from March 4 of the odd-numbered year to March 3 of the next odd-numbered year. The first session of each Congress began on the first Monday in December, as provided in U.S. CONST., art. I, § 4, cl. 2, and usually lasted well into spring. The

The opportunity for immediate reconsideration after the intersession adjournment is guaranteed by the rules of each house of Congress, which mandate that all business unfinished at the end of the first session shall be resumed at the start of the second.²⁷ More-

second session commenced the following December, after the November congressional elections, and had to adjourn by March 3. With many of its members having given up or lost their seats for the following term and with only a few months in which to work, Congress during its second session was unable to give serious consideration to many of the items before it. Adjournment of the first session hence in fact often precluded reconsideration.

²⁷ Rule XVIII of the Standing Rules of the Senate, S. Doc. No. 10, 98th Cong., 1st Sess. 13 (1983), provides:

At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place.

House Rule XXVI states: "All business before committees of the House at the end of one session will be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place." Constitution, Jefferscn's Manual and Rules of the House of Representatives, H. Doc. No. 271, 97th Cong., 2d Sess., § 901, at 610-11 (1983). Further, "[t]he business of conferences between the two Houses is not interrupted by adjournment of a session which does not terminate the Congress, and even where one House asks a conference at one session the other may agree to it in the next session." *Id.* at 611 annotation (citations omitted).

In light of the carryover rules, it would be difficult to justify finding that return was prevented simply by delay alone. Because neither the Constitution nor the rules of either house place any time limit on reconsideration of returned bills, reconsideration of a bill returned during session could easily be

over, because in this case, as is typical, the adjournment resolution provided that Congress could be reassembled at any time, and because the rules of the two houses permit the convening of congressional committees during adjournment,²⁸ reconsideration of a bill returned during an intersession adjournment is not necessarily delayed even the several weeks that such an adjournment lasts.

Uncertainty no more characterizes return during adjournment that does delay. As in the case of intra-session adjournments, the organization of each house of Congress remains unchanged, and their respective staffs continue to function uninterrupted.²⁹ More im-

delayed longer than reconsideration of a bill returned during adjournment.

²⁸ Congressional committees, "which, in the legislative scheme of things, [are] for all practical purposes Congress itself," *Doe v. McMillan*, 412 U.S. 306, 344 (1973) (Rehnquist, J., concurring and dissenting), are authorized during adjournments to continue to sit, to hold hearings, to conduct investigations, and to compel testimony and the production of documents. S. Doc. No. 10, *supra* note 27, at 33-34 (Rule XXVI); H. Doc. No. 271, *supra* note 27, § 589, at 275.

²⁹ *Wright*, 302 U.S. at 595. Congressional practice conforms to the modern understanding under the Twentieth Amendment that the houses of each Congress constitutionally exist from January 3 of each odd-numbered year through January 3 of the next odd-numbered year, regardless whether the houses are sitting or in adjournment. Thus, even when the houses are not in session, they can exchange messages and have bills enrolled, signed, and presented to the President. H. Doc. No. 271, *supra* note 27, § 560, at 263 annotation (messages); *id.* §§ 574-577, at 268-70 (enrollment, signing, and presentation); *see, e.g.*, 129 Cong. Rec. S17,192 (daily ed. Nov. 18, 1983); 127 Cong. Rec. S15,632 (daily ed. Dec. 16, 1981); 125 Cong. Rec. 37,317, 37,475 (1979); 123 Cong. Rec. 38,948, 39,081 (1977); 121 Cong. Rec. 41,975, 42,276-77 (1975); 119 Cong. Rec. 43,327 (1973).

portantly, neither house any longer lacks an authorized procedure for acceptance of veto messages during adjournment. The House of Representatives provides by rule that return may be made to the Clerk of the House; the Senate, by resolution, provides for acceptance of veto messages by the Senate Secretary.³⁰ In both cases, the time of delivery is recorded on the journal of the respective house, and the message is retained by the authorized officer for presentation on the floor of the house immediately upon the house's reconvening. The return may thus "be accomplished as a matter of public record accessible to every citizen." *Kennedy v. Sampson*, 511 F.2d at 441. The status of a bill returned during an intersession adjournment therefore "would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session."³¹

³⁰ See *supra* p. 5.

³¹ *Id.* The procedure for return during intersession adjournment is in every respect identical to the procedure used in intrasession adjournments, the constitutional effectiveness of which has been clear to both the Executive and the Legislative Branches since *Wright*. President Reagan himself has frequently delivered veto messages during an adjournment of Congress, by using this procedure. See Joint Brief for the Plaintiff-Appellant app. III, at 71-72.

No more uncertainty surrounds this procedure than accompanies the corresponding procedure by which the Executive Clerk receives bills for the President and returns them to Congress. See *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624 (Ct. Cl. 1964) (delivery of bill to the

That intersession adjournments no longer present any real obstacle to the President's exercise of his qualified veto power was recognized by Presidents Ford and Carter, both of whom assumed the effectiveness of return vetoes made during such an adjournment.³² To conclude otherwise is "to ignore the plain-

Executive Clerk while the President is overseas constitutes effective "presentment"), *cert. denied*, 380 U.S. 950 (1965).

³² The Ford Administration made its position on intersession pocket vetoes clear in the aftermath of *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976), a case arising shortly after *Sampson* that involved a challenge by Senator Kennedy to two pocket vetoes, one during the intersession adjournment of the Ninety-third Congress and the other during a one-month intrasession adjournment of that Congress. The Executive Branch conceded to the entry of summary judgment in Senator Kennedy's favor. Attorney General Levi announced the President's decision that he would thereafter return disapproved bills during any intrasession and intersession adjournments of Congress, as long as appropriate arrangements for receipt of veto messages were made. 122 CONG. REC. 11,202 (1976). On December 31, 1975, and January 2, 1976, during Congress's intersession adjournment, President Ford vetoed, respectively, S. 2350 and H.R. 5900, which had been passed during the first session of the Ninety-four Congress. House Calendar, 94th Cong. 130-31 (final ed. 1977). The vetoed bills were accepted by the appointed officers of the respective houses and were noted in the respective journals. Senate Journal, 94th Cong., 1st Sess. 1431 (1975); House Journal, 94th Cong., 1st Sess. 2246-47 (1975). Upon the convening of the second session, the messages were laid before the houses. 122 CONG. REC. 2, 145 (1976). Both vetoes were sustained. House Calendar, 94th Cong. 130-31 (final ed. 1977).

Like President Ford, President Carter also refrained from using the pocket veto during intersession adjournments. He returned S. 2096, 96th Congress, to the Senate, by delivery to the Secretary of the Senate, after the Senate had adjourned its first session *sine die*. 126 CONG. REC. 6-7 (1980).

est practical considerations and by implying a requirement of an artificial formality to erect a barrier to the exercise of a constitutional right." *Wright*, 302 U.S. at 590. For the line that divides the first session of a Congress from the second has ceased to have any practical significance. Were it not for the Article I, section 4, clause 2 requirement that "[t]he Congress shall assemble at least once in every Year," that line, it seems to us, would completely dissolve.³³

We fully recognize that clear rules respecting the pocket veto are vitally necessary in order that the status of bills in presidential disfavor be promptly resolved. In seeking clarity, we must be careful not to stray into arbitrariness by drawing an irrational line between intrasession and intersession adjournments. For we must be guided by the evident pur-

³³ The District Court apparently believed that to take the reality of intersession adjournments into consideration in determining whether they prevent return of disapproved bills would run afoul of the Supreme Court's recent statement that the fact that a practice might be "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Immigration & Naturalization Serv. v. Chadha*, 103 S. Ct. 2764, 2780-81 (1983). We do not agree with the District Court that *Chadha* is apposite to the issue presented here. *Chadha* involved a procedure that, although of long-standing use, was nonetheless manifestly contrary to the dictates of the Constitution. By contrast, the issue here is whether the constitutional provision applies at all. No court can blind itself to the facts of a situation in determining whether it falls within the intended scope of a particular provision, as both the *Pocket Veto Case* and *Wright* plainly demonstrate. See also *Edwards v. United States*, 286 U.S. 482, 493 (1932) (construing veto provisions to permit President to approve bills after Congress has adjourned, on the ground that "[n]o public interest would be conserved" by a contrary rule), discussed *supra*, at note 22.

pose of the pocket veto clause, which is simply to ensure that the President not be deprived of an opportunity to disapprove legislation. Manifestly, the president is no more deprived of that opportunity by a modern intersession adjournment than he was by the adjournments in *Wright* and *Sampson*. The line between intersession and intrasession adjournments, although a bright one, in no way furthers the intent behind the pocket veto clause, and it therefore fails to comport with the authorities interpreting the clause. Nothing is gained by drawing such a line. And what is lost is substantial, for a rule based on such a line deprives Congress of the final word on a significant portion of its legislation and grants the President an absolute veto, even though Congress has shown no disrespect for the President's role in the enactment process.

Appellees contend, nonetheless, that failure to recognize the intersession-intrasession line constitutes a departure from an historical understanding that the pocket veto clause is to apply during intersession adjournments. Brief for the Appellees at 29-30. In support of their argument they point to a change made between two drafts of the clause in the Committee of Detail. The clause, as taken from the New York Constitution, originally stated that an unreturned bill would become law, "unless the Legislature by their Adjournment prevent [the bill's] Return; in which Case it shall be returned on the first Day of the next Meeting of the Legislature." 2 M. Farrand, *supra*, p. 19, at 167. This language would presumably have precluded the pocket veto entirely. The concluding phrase of the clause was stricken, however, and in its place were substituted the words

"in which case it shall not," that is, it shall not become a law. *Id.* The change, appellees contend, evidences a conception on the part of the drafters that intersession adjournments would prevent return.

We would not deny the plausibility of appellees' explanation of the deletion of one phrase and the substitution of another in the Committee of Detail's early drafts of the veto provision. Indeed, that explanation receives indirect support from evidence indicating that the Framers envisioned that Congress would convene its annual session, complete its business within several months, and adjourn for the remaining three-fourths of the year.³⁴ As was the rule in the English Parliament of the era, business unfinished in the first session of a Congress was likely thought not to carry over to the second session.³⁵ With such a calendar in mind, members of the Committee of Detail may well have been of the view that adjournment at the end of the first session would prevent return of a bill.

But the adjournment practices of Congress as envisioned by members of the Committee bear no resemblance to the actual adjournment practices of the modern-day Congress, and to accord determinative weight to the Committee's supposed views on whether intersession adjournments prevented return would therefore seriously disserve the larger purpose of the pocket veto clause as understood by the Supreme

³⁴ See 2 M. FARRAND, *supra* p. 19, at 199-200 (debate over whether Congress should sit during Winter or Spring); Kennedy, *Congress, the President and the Pocket Veto*, 63 VA. L. REV. 355, 362 (1977).

³⁵ See Note, *The Presidential Veto Power: A Shallow Pocket*, 70 MICH. L. REV. 148, 165 (1971).

Court.³⁶ Given that under the principles of *Wright* and the *Pocket Veto Case*, intersession adjournments no longer pose the least obstacle to the President's exercise of his qualified veto, it cannot be dispositive that the Committee of Detail may have believed they would.

Appellees point out that the view that intersession adjournments do create an opportunity for a pocket veto has been accepted through most of the history of the Republic by both the President and Congress. Brief for the Appellees at 22-29. Beginning with President Jefferson and continuing through Presi-

³⁶ As Senator Ervin remarked:

[A]t the time the Constitution was written and for many years thereafter, it was the custom of the Congress to meet only during the first few months of each year and then to go home. The 10-day provision obviously was written into the Constitution to cover the adjournments at the end of a session, since Congress would be absent from the Capitol for many months. Today, of course, we have a different situation entirely. The Founding Fathers . . . did not foresee that Congress would become a year-round operation, often straining to finish its business before the constitutional end of a Congress.

Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary, United States Senate, 92 Cong., 1st Sess. 3 (1971); see Comment, The Veto Power and Kennedy v. Sampson: Burning a Hole in the President's Pocket, 69 NW. U.L. REV. 587, 610 (1974) ("[I]mproved transportation and a more burdensome workload have drastically altered the character of the congressional schedule. Journeys which in past years lasted days are now measured in hours. The modern Congress works almost year-round to complete a staggering agenda. These factors have produced congressional calendars marked by numerous short recesses rather than a single lengthy one.").

dent Nixon, twenty-five of the thirty Presidents who have exercised the pocket veto power at all have done so during intersession adjournments. In each of these pocket vetoes—272 in all—Congress has acquiesced. What is more, appellees argue, Congress in 1868 would have codified this practice of acquiescence into law with a bill to limit pocket vetoes to intersession adjournments, were it not for successful objections that so limiting *intrasession* pocket vetoes would be unconstitutional.

Clearly, however, neither the past practice of the Executive nor Congress's acquiescence in that practice is conclusive in this case. See *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2780-81, 2784 (1983). Nor is that practice particularly relevant here, given that it developed under adjournment conditions markedly different from those prevailing today.

Appellees raise a final argument in support of the result arrived at by the District Court. Conceding the absence of any practical difference between intrasession and intersession adjournments, they contend that the truly correct "bright line" must be drawn at the three-day mark. Thus, if the tenth day after presentment falls during an adjournment of over three days, a bill that has not yet been returned expires by pocket veto, regardless of the existence of procedures that would ensure actual return to the originating house. Appellees contend that this principle is, in fact, revealed by reading *Pocket Veto* and *Wright* together; the former case established the legal irrelevance of procedures that ensure return during the absence of Congress; the latter, it is suggested declared that the only adjournments that do not prevent return are those of three days or fewer. Appel-

lees also argue that the three-day rule correctly captures the intent of the Framers regarding operation of the pocket veto clause. That clause, they assert, must be read in conjunction with clause 4 of Article I, section 5 of the Constitution, which provides, in part, that "[n]either House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." Appellees argue that, because every adjournment of over three days is, by the terms of that provision, necessarily either a simultaneous adjournment of both houses or an adjournment of one house pursuant to joint action by both houses, every such adjournment is one by "the Congress." When, therefore, the Framers mandated that an unreturned bill expires if "the Congress by their Adjournment prevent its Return," they must have been referring to all adjournments of over three days.

As appellees readily admit, under their interpretation of the pocket veto clause, *Kennedy v. Sampson*, which denied the use of the pocket veto in all intrasession adjournments of any length, was wrongly decided and should be overruled. Of course, as appellees must also be aware, this panel is not free to reconsider a decision by another panel of this court. Until it is overruled by the full court sitting *en banc*, *Kennedy v. Sampson* will remain the law of this circuit. *Brewster v. Commissioner of Internal Revenue*, 607 F.2d 1369, 1373 (D.C. Cir.), *cert. denied*, 444 U.S. 991 (1979).

But even if *Sampson* had never been decided, we would be compelled to reject appellees' three-day rule, for we cannot agree that any special connection exists between the pocket veto clause and the clause governing adjournment by one house. Indeed, there

is strong reason to believe that the Framers intended no such connection whatsoever. The pocket veto clause speaks of adjournment by "the Congress". The phrase "by their Adjournment" by itself plainly refers to any adjournment by Congress, including an adjournment of one day, two days, or three days. Thus, the words of the pocket veto clause cannot support the three-day rule. But neither can reference to clause 4 of Article I, section 5, for that provision relates only to one-house adjournments. Appellees' choice of three days as a bright line thus appears to have no textual grounding at all.

Appellees propose the three-day rule, it seems likely to us, because they could not credibly argue for the extreme position that *every* adjournment by the Congress, no matter how short, creates an opportunity for a valid pocket veto. Such an argument would render nugatory the phrase "prevent its return"; the pocket veto clause would operate as if it read "unless the Congress adjourn, in which case the bill shall not become a law." That reading, in direct contravention to the purpose of the clause, would permit the President an absolute veto whenever Congress is not physically within the walls of the Capitol. *Wright*, 302 U.S. at 594. Such an interpretation would also plainly contravene the Supreme Court's statement in *Pocket Veto* that "the determinative question in reference to an 'adjournment' is . . . whether it is one that 'prevents' the President from returning the bill." 279 U.S. at 680. Only those adjournments that actually prevent return create the opportunity for a pocket veto. Appellees argue that every adjournment of four days or more does precisely that. But the Supreme Court's cases plainly teach us that it is impossible to know

whether an adjournment prevents return merely from the fact that it is a particular type of adjournment. Rather, a court must examine the conditions surrounding that type of adjournment and determine whether any obstacle to exercise of the President's qualified veto is posed.³⁷ To choose a three-day line, or any line, simply because it is a line ignores the Court's mandate and the purpose of the pocket veto clause.

The distinction between a three-day adjournment and a four-day adjournment is no more worthy of constitutional significance than is the distinction between modern intrasession and intersession adjournments. Neither distinction finds any support in Article I, section 7, clause 2. Both are arbitrary and frustrate the goal of protecting Congress's right to overrule presidential disapproval without furthering the goal of protecting the President's opportunity to disapprove of legislation. By rejecting these distinctions we do not by any means read the pocket veto clause out of the Constitution. The clause necessarily applies to the final adjournment by a Congress, because under Article I, section 2, clause 1, that Congress has gone permanently out of existence and therefore cannot reconsider a vetoed bill. *See Ken-*

³⁷ Thus, contrary to appellees' understanding, whether return was prevented within the meaning of the pocket veto clause and whether return was practically impossible are not, two "very different" questions, Brief for the Appellees at 58, but rather are one and the same question. To determine "constitutional prevention" is, as the Court's approach in *Pocket Veto* and *Wright* makes clear, precisely to determine "actual prevention"; such a determination cannot be made without regard for "the manifest realities of the situation." *Wright*, 302 U.S. at 595. The distinction appellees draw between the two issues simply defies logic and common sense.

nedy, *supra* note 34, at 381. Moreover, we do not hold that intersession adjournments can never prevent return. Congress might someday revoke the existing authority of its agents to receive presidential veto messages, or rescind its rules mandating the carryover of unfinished business from the first session to the second, or resume its early practice of half-year intersession adjournments. In such a case, an intersession adjournment would resemble that involved in the *Pocket Veto Case*, and that case would unquestionably govern. But the present case is not a second *Pocket Veto Case*. The existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together, satisfy us that when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented. We therefore hold that H.R. 4042 became law, and accordingly reverse and remand the decision of the District Court with instructions to enter summary declaratory judgment for appellants.

It is so ordered.

BORK, *Circuit Judge, dissenting*: The phenomenon of litigation directly between Congress and the President concerning their respective constitutional powers and prerogatives is a recent one. It was unknown through more than a century and three quarters of our jurisprudence—until this court accepted the invitation to umpire such disputes in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

This fact alone, the complete novelty of the direct intermediation of the courts in disputes between the President and the Congress, ought to give us pause. When reflection discloses that what we are asked to endorse is a major shift in basic constitutional arrangements, we ought to do more than pause. We ought to renounce outright the whole notion of congressional standing.

I write at some length because of the importance of the constitutional issue and because in this case, unlike those in which similar protests have been lodged, the error in analysis produces an error in result. See *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C. Cir.) (Bork, J., concurring), *cert. denied*, 104 S. Ct. 91 (1983), and *Moore v. U.S. House of Representatives*, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985). To date these protests have been unavailing. With a constitutional insouciance impressive to behold, various panels of this court, without approval of the full court, have announced that we have jurisdiction to entertain lawsuits about governmental powers brought by congressmen against the President. That jurisdiction floats in midair. Any foundations it may once have been thought to possess have long since been swept away by the Supreme Court. More than that, the

jurisdiction asserted is flatly inconsistent with the judicial function designed by the Framers of the Constitution.

Appellants seek judicial review of a dispute between the Legislative and Executive Branches over the validity of the presidential "pocket veto" as applied to bills presented to the President less than ten days before an intersession adjournment of Congress. The individual appellants—individual members of Congress—allege that they have been injured by this use of the pocket veto because the veto nullified their original votes in favor of the bill in question. The institutional appellants—the Senate and the leadership of the House—allege injury to their "participation in the lawmaking process, since it is the Senate and the House of Representatives that pass legislation under article I, and improper exercise of the pocket veto power infringes that right" *Maj. op.* at 8. The majority describes the individual appellants' injury as "a diminution of the . . . power to participate in the enactment of legislation through voting on proposed or returned bills," *id.* at 6 n.11, and the institutional appellants' injury as "an injury to the lawmaking powers of the two houses of Congress." *Id.* at 6.

It is clear, then, that appellants are suing not because of any personal injury done them but solely to have the courts define and protect their governmental powers. Until this circuit permitted such actions eleven years ago, this suit would have been impossible. Indeed, for most of our history this suit would have been inconceivable. The respective constitutional powers of Congress and the President could have been given judicial definition only when a private party, alleging a concrete injury, actual or

threatened, brought those powers necessarily into question. No doubt it appears more "convenient" to let congressmen sue directly and at once; in actuality, that convenience is purchased at the cost of subverting the constitutional roles of our political institutions.¹

Major alterations in the constitutional system can be accomplished through what seem to be minor adjustments in technical doctrine. That is the case here. By according congressmen standing to sue the President, this court proposes a new and much different answer to the question of the proper role of the federal courts in American constitutional disputation. Changing the constitutional role of the federal courts, moreover, necessarily also alters that of Congress and the President, and seems, on the rationale the majority advances, destined to alter that

¹ The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit. Similarly, in *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974), the Executive Branch conceded that either House of Congress would have standing to sue based on injury to its lawmaking powers. That concession does not, of course, remove the issue from this dispute, for it is axiomatic that parties cannot confer subject matter jurisdiction by waiver. No reason appears why the Executive should oppose standing for individual legislators but concede as to a House. The constitutional problems would seem to be identical. More important is the misunderstanding of the importance of the issue that underlies this concession. According to counsel, the Executive Branch is pursuing decision on the merits to vindicate its governmental interest in constitutional governance. While this is undoubtedly true, I suggest that, given this concern, appellees have misordered the priorities. By conceding the standing issue appellees endanger a constitutional principle far more momentous than the scope of the pocket veto power, especially since the latter issue can arise and be decided later in a private suit.

of the States as well. All of these changes work to enhance the power and the prestige of the federal judiciary at the expense of those other institutions.

Fortunately, the question is not an open one. It is clear upon several lines of analysis that appellants have no standing to litigate the issue they would place before us. Because the significance of what is taking place through this circuit's reshaping of standing doctrine appears to be inadequately appreciated, however, I first undertake to demonstrate that the rationale which underlines congressional standing doctrine also demands that members of the Executive and the Judicial Branches be granted standing to sue when their official powers are allegedly infringed by another branch or by others within the same branch. In addition, states would have standing to protect their powers of governance against the national government on the same theory. The consequences of this expansion of standing, which will bring an enormous number of inter- and intra-government disputes into the federal courts (usually, one supposes, into this physically convenient court) will be nothing short of revolutionary. I next demonstrate that three separate strands of Supreme Court precedent, and the philosophy underlying them, foreclose the possibility of standing here. The criteria articulated by the Supreme Court to govern cases such as this, the argument proceeds, carry out the intentions of the Framers of the Constitution with respect to the role of the federal courts in disputes between or within the political branches. I then show that the aggrandizement of the powers of the judiciary inherent in the doctrine of governmental standing is not made more palatable by the doctrine of "circumscribed equitable discretion" or "remedial dis-

cretion" this court has invented precisely to compensate in part for the deficiencies in its standing doctrine. Finally, I explain why the Supreme Court decisions the majority relies upon are inapposite and why we are not, at present, bound by prior decisions of this court that created and sustained the doctrine under review.

I.

The issue of standing is jurisdictional. If a court concludes that a party lacks standing, the court may not proceed to decide the merits of the suit. Though it is sometimes said that standing raises the question whether the party is fit to litigate an issue, whether he has been injured directly so that he possesses "that concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 369 U.S. 186, 204 (1962), it is clear that much more is involved. The standing requirement, at bottom, has to do with what kinds of interests courts will undertake to protect. As Justice Powell put it in *Warth v. Seldin*, 422 U.S. 490, 498 (1975):

In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. In both dimensions [*standing*] is founded in concern about the proper—and properly limited—role of the courts in a democratic society.

(Citations omitted; emphasis added.)

This should make it clear that the jurisdictional requirement of standing keeps courts out of areas that are not properly theirs. It is thus an aspect of

democratic theory. Questions of jurisdiction are questions of power, power not merely over the case at hand but power over issues and over other branches of government. Article III of the Constitution confers the "judicial Power of the United States" and limits that power in several ways. Among the most important limitations is that expressed in section 2 of article III, confining our jurisdiction to "Cases" and "Controversies." The meaning of those terms, however, is decided by federal courts. It follows that judges can determine the extent of their own power within American government by how they define cases and controversies. It is for this reason that the proper definition of those terms is crucial to the maintenance of the separation of powers that is central to our constitutional structure.

"Standing" is one of the concepts courts have evolved to limit their jurisdiction and hence to preserve the separation of powers. A critical aspect of the idea of standing is the definition of the interests that courts are willing to protect through adjudication. A person may have an interest in receiving money supposedly due him under law. Courts routinely regard an injury to that interest as conferring upon that person standing to litigate. Another person may have an equally intensely felt interest in the proper constitutional performance of the United States government. Courts have routinely regarded injury to that interest and not conferring standing to litigate. The difference between the two situations is not the reality or intensity of the injuries felt but a perception that according standing in the latter case would so enhance the power of the courts as to make them the dominant branch of government. There would be no issue of governance that could not

at once be brought into the federal courts for conclusive disposition. Every time a court expands the definition of standing, the definition of the interests it is willing to protect through adjudication, the area of judicial dominance grows and the area of democratic rule contracts. That is what is happening in this case. My disagreement with the majority, therefore, is about first principles of constitutionalism.

The contours of the standing concept are often fuzzy and ill-defined, but it is not the less fundamental for that. As I wrote in *Vander Jagt*, 699 F.2d at 1178-79, "[a]ll of the doctrines that cluster about article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

There may be doubts about what this political-legal idea means for the standing requirement in many cases. This is not such a case. Here it is clear that according these appellants and appellant-intervenors standing is a flat violation of our basic ideas about "the proper—and properly limited—role of the court in a democratic society."

The concept of congressional standing, as the majority opinion makes clear, rests upon the idea that members or Houses of Congress must be able to sue to vindicate powers or rights lodged in them by the Constitution. See maj. op. at 8-9, 13-14. Nothing else is required to confer standing under the doctrine as it has been enunciated by this court. It follows, according to the majority, that appellants have stand-

ing to maintain an action against an officer of the Executive Branch to establish that the President's exercise of his pocket veto power was not within the terms set by the Constitution. This may sound unexceptional; it is, in fact, a constitutional upheaval.

The first problem with this court's doctrine of congressional standing is that, on the terms of its own rationale, the concept is uncontrollable. Congress is not alone in having governmental powers created or contemplated by the Constitution. This means that the vindication-of-constitutional-powers rationale must confer standing upon the President and the judiciary to sue other branches just as much as it does upon Congress. "Congressional standing" is merely a subset of "governmental standing." This rationale would also confer standing upon states or their legislators, executives, or judges to sue various branches of the federal government. Indeed, no reason appears why the power or duty being vindicated must derive from the Constitution. One would think a legal interest created by statute or regulation would suffice to confer standing upon an agency or official who thought that interest had been invaded.²

² Indeed, this court has so held, on the authority of *Kennedy v. Sampson*, *AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982). In *Pierce*, employees of a federal agency, their union, and Congressman Sabo sued to enjoin a proposed reduction-in-force on the grounds that it was a reorganization of the agency barred by statute in the absence of prior approval by the House Appropriations Committee. *Id.* at 304. The district court held that Congressman Sabo had standing and did not decide whether the employees or their union could sue. The case was taken as an emergency expedited appeal, and the panel, on which I sat, held that Congressman Sabo did not have standing as a member of the House of Representatives, but did have standing as a member of the Appropriations Committee. *Id.* at 305. Citing *Kennedy*, the per curiam opin-

These points become obvious upon examination of the court's doctrine. If this extrapolation of that doctrine at first seems far-fetched, that is only because it points to a new and wholly unfamiliar legal and constitutional world. Yet such a world is precisely what the rationale of the congressional standing doctrine, honestly applied, will create. No avoidance of these implications is possible unless courts lay down fiat, resting upon no discernible principle, that arbitrarily limit those institutions whose members may vindicate constitutional and legal interests. Because the implications of what is being done here are unfamiliar, it will be well to offer a few examples of governmental standing that flow directly from the majority's rationale.

We may begin with Congress. Members of Congress, dissatisfied with the President's performance, need no longer proceed, as historically they always have, by oversight hearings, budget restrictions, political struggle, appeals to the electorate, and the

ion held that the statute gave each member of the Appropriations Committee the right to participate in approval of any reorganization of the agency. Hence "[t]he Secretary's actions injured him by depriving him of that specific statutory right to participate in the legislative process." *Id.* Since Congressman Sabo had standing, the panel did not decide "the question whether the district court was the appropriate forum for the employees' complaint." *Id.* at 304. My vote in *Pierce* is, of course, inconsistent with the position I adopt in this dissent and previously adopted in my concurrences in *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1177 (D.C. Cir. 1983), and *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983). I overlooked the latent separation-of-powers issues in that case, which was my first encounter with this court's congressional standing doctrine, and in which, because of the emergency nature of the appeal, the opinion was released one day after oral argument. See *Pierce*, 697 F.2d at 303.

like, but may simply come to the district court down the hill from the Capitol and obtain a ruling from a federal judge. *The Pocket Veto Case*, 279 U.S. 655 (1929), for example, need not have awaited suit by persons who thought themselves unlawfully deprived of monies: had the congressmen and courts of that time understood what this court now understands, an abstract ruling on the principle of the thing could have been obtained immediately after the President failed to sign the bill. Members of Congress would have standing to sue the President whenever he committed troops, as in Lebanon, on the allegation that there had been a violation of the War Powers Resolution or of Congress' power to declare war under article I, section 8. Members could sue the President about his law enforcement policies and priorities, claiming that their power to make laws under article I, section 8, and his duty, arising under article II, section 3, to "take Care that the Laws be faithfully executed," had both been infringed.³ Examples of this sort could be multiplied indefinitely.

³ This court has rejected some efforts by legislators to sue on the basis of "the allegedly improper execution of an enacted law," on the grounds that "[t]he injury to the legislator was a generalized grievance about the conduct of government, not a claim founded on injury to the legislator by distortion of the process by which a bill becomes law." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 952 (D.C. Cir. 1984) (explaining *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), and *AFGE v. Pierce*, 697 F.2d 303 (D.C. Cir. 1982), as involving only generalized complaints). The attempted distinction is untenable. If a President refused to enforce a law Congress had validly enacted, that would nullify legislators' votes and impair the lawmaking powers of Congress just as surely as if the President had employed the pocket veto. Yet, under the distinction drawn in *Moore*, a refusal to enforce would be treated as giving rise to nothing more

But the transformation this court has wrought in its own powers necessarily runs much farther than that. If Congress, its Houses, or its members can sue the President for a declaration of abstract legal right, it must follow that the President may, by the same token, sue Congress. For example, Presidents at least since Franklin Roosevelt have objected to the device known as the congressional veto on the grounds of its unconstitutionality. Had they understood our constitutional system as this court now understands it, these Presidents need not have waited for a private person to raise the issue in *INS v. Chadha*, 103 S. Ct. 2764 (1983), to obtain a declaration of the unconstitutionality of that device, but could have sued Congress at any time. This court may become a potent supplement to the checks and balances the Constitution provides. Under the majority's reasoning, whenever the President vetoes a bill that, in his judgment, requires him to execute an unconstitutional law or invades his legitimate constitutional

than a generalized grievance, while the pocket veto would be treated as occasioning an injury "to the members' rights to participate and vote on legislation in a manner defined by the Constitution." 733 F.2d at 951. The grounds for this difference in treatment are that a legislator has "a right and a duty to participate" in the process by which a bill becomes law. *Id.* at 952. That may be, but the legislator whose vote is nullified by a pocket veto has exercised his right and fulfilled his duty—it is the impairment of his lawmaking power that, on this court's analysis, gives him standing to sue. Since that impairment occurs whenever a President fails to enforce the law as Congress intended it, enforcement challenges must be heard if this court's rationale is to be fairly applied. Thus, this court's view of standing, applied in a principled fashion, would move the obligation to "take Care that the Laws be faithfully executed" out of article II of the Constitution and divide it between articles I and III.

powers and Congress overrides his veto, the President may sue before the ink is dry for a judicial declaration of unconstitutionality. We will become not only a party of the legislative process but perhaps the most important part.

Indeed, if unlawful interference with one's official powers is enough to confer standing I do not know why members of the judiciary should not join in the game, with the added advantage, of course, that one federal judge's lawsuit claiming a right to powers denied would be heard and decided by other federal judges. Thus, when Congress limited the habeas corpus jurisdiction of the District Court for the District of Columbia, there is no reason, under the majority's rationale, why a district court judge, or a judge of this court who had lost appellate jurisdiction, should not have sued Congress and the President for a declaration of unconstitutionality. In this court he would, apparently, have won, *see Pressley v. Swain*, 515 F.2d 1290 (D.C. Cir. 1975) (en banc); *Palmore v. Superior Court of the District of Columbia*, 515 F.2d 1294 (D.C. Cir. 1975) (en banc), though he would not have succeeded in the Supreme Court, *see Swain v. Pressley*, 430 U.S. 372 (1977).

Intra-branch disputes also must succumb to this court's plenary interpretation of its own powers. *See, e.g., Vander Jagt*, 699 F.2d 1166. Individual legislators now have standing to sue each other, the Houses of Congress, other bodies composed of legislators, such as committees and caucuses, and so on. Virtually every internal rule, custom, or practice by which the internal operations of Congress are regulated is reviewable at the discretion of this court at the behest of disgruntled legislators. That means, for example, that the opponents of a filibuster have

standing to sue for an injunction directing the filibuster to cease. Legislators who were not selected to serve on the committees of their choice have standing to challenge the manner in which the selection process was conducted. Indeed, this court has so held. *Vander Jagt*, 699 F.2d at 1170. No matter how intrusive the relief sought, this court has jurisdiction so long as the legislator can show some relationship between the congressional behavior he challenges and his own influence and effectiveness as a legislator. Congress, in short, is subject to judicial oversight to whatever degree this court, exercising its newly-invented powers of equitable discretion, decides supervision is warranted, or, as one of our cases puts it, not "startlingly unattractive." *Vander Jagt*, 699 F.2d at 1176 (*quoting Davids v. Akers*, 549 F.2d 120, 123 (9th Cir. 1977)). It appears that our constitutional jurisdiction now rests less upon law than upon aesthetic judgments.

The same reasoning, of course, applies to disputes within the Executive and Judicial Branches. The head of an agency who believes that another agency has improperly encroached on an area confided to his administration by statute or regulation no longer need bring the dispute before the President, for the courts stand ready to resolve it.⁴ Beyond that, a cabinet officer aggrieved by an Executive Order or any other exercise of presidential power, one which arguably requires him to violate an act of Congress, can proceed to challenge the offending directive in federal court, where declaratory judgment and in-

⁴ The majority clearly believes that *Chapman v. FPC*, 345 U.S. 153 (1953), establishes that this is already the law, but as shown *infra* at pp. 47-51, that case does not at all have the import the majority ascribes to it.

junctive relief are available to set the President right. Presumably, a district judge whose jurisdiction had been limited by a court of appeals decision could seek rehearing *en banc* or petition the Supreme Court for a writ of certiorari. According to this court's rationale, I should be able to petition the Supreme Court for a writ of certiorari or of mandamus to overturn the result in this case because it unconstitutionally alters my duties and powers as an article III judge.⁵

Nor must it be forgotten that the Constitution contemplates areas of authority for the states, areas in which the national government is not to impinge. Should Congress enact a law that arguably is beyond its powers and that has an impact upon citizens of the several states, it would seem, under this court's reasoning, that members of a state legislature, whose jurisdiction had been ousted, would have standing to sue the national executive to enjoin enforcement of that law. Certainly the State itself would have standing. States, after all, have constitutional functions and powers as surely as Congress does.

Enough has been said perhaps to indicate the breathtaking transformation of the judicial function, the relationships between the branches of the national government, and the relationships between fed-

⁵ Lest this be regarded as fantasy or burlesque, it should be noted that this very sort of litigation within the judicial branch is being attempted. See *In re Robson and Will, petition for mandamus or in the alternative for cert. filed*, 58 U.S.L.W. 3552 (U.S. Feb. 5, 1985) (No. 84-1127) (United States District Judges seeking relief against Court of Appeals on grounds that Court of Appeals improperly substituted its discretion for that of the District Court, and exceeded its authority by ordering a remedy that is contrary to law). The possibilities seem boundless.

eral and state governments that waits at the end of the road upon which this court has set its foot. It is clear from the cases that even this first step is illegitimate.

II.

It is easily demonstrated from several different lines of cases that the doctrine of congressional standing is ruled out by binding Supreme Court precedent. These lines of authority will be examined separately, and I will then suggest that they are but facets of the same set of considerations.

A.

It has been noted already that the rationale upon which the majority accords standing to members of Congress and the Senate in this case would equally permit suits by states to challenge federal laws or actions that seem to impinge upon their sovereignty. But this result, of course, contravenes *Massachusetts v. Mellon*, 262 U.S. 447 (1923), and does so in a way that shows both the impropriety of the doctrine of governmental standing and the impropriety of that doctrine even if confined, illogically, to suits by congressmen.

In *Massachusetts v. Mellon*, the Commonwealth of Massachusetts brought an original action in the Supreme Court against various federal officials to enjoin, as unconstitutional, enforcement of the Maternity Act. 262 U.S. at 478. The statute provided appropriations to be apportioned among states that would comply with the law's provisions for the purpose of federal-state cooperation to reduce maternal and infant mortality and protect the health of mothers and infants. *Id.* at 479. Massachusetts, in an argument exactly parallel to that the majority ad-

vances here, claimed that the Maternity Act was a usurpation of power not granted to Congress, but reserved to the States, by the Constitution. The State asserted standing because its "rights and powers as a sovereign State . . . [had] been invaded." *Id.* The Supreme Court responded that

in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate, not rights of person or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government. . . . [T]his Court is . . . without authority to pass abstract opinions upon the constitutionality of acts of Congress

Id. at 484-85.

In the present case we are asked to pass an abstract opinion upon the constitutionality of an act of the President. Unlike the Supreme Court, the majority here complies with that request. But, if *Massachusetts v. Mellon* is right, the majority is wrong. If, on the other hand, the majority is right, its rationale would, as already noted, lead to the overruling of *Massachusetts v. Mellon*, not merely in its general approach, but on the specific situation presented there: all states would have standing to challenge any action by any branch of the federal government even though nothing more concrete than disagreement about constitutional powers was at stake. Since this court is not empowered to overrule *Massa-*

chusetts v. Mellon,⁶ I think the reasoning of that case requires a conclusion that there is no standing here.

⁶ The majority claims that *Massachusetts v. Mellon* is "in no respect . . . contrary" to the majority's position. Maj. op. at 11 n.14. But the majority then proceeds to explain that case and cases that came afterward, such as *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled on other grounds*, *Garcia v. San Antonio Metropolitan Transit Authority*, 53 U.S.L.W. 4135 (U.S. Feb. 19, 1985) (Nos. 82-1913 & 82-1951), in a way that shows *Massachusetts v. Mellon* to be contrary to its position in every respect. Thus, the majority quotes a passage from that decision pointing out that *Massachusetts* complained of federal usurpation of the reserved powers of the states "by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent." Maj. op. at 11 n.14 (quoting 262 U.S. at 483). The majority concludes its discussion with the statement that "*Massachusetts v. Mellon* did not establish that governmental officials and entities necessarily and always lack standing to raise claims of infringement of lawful functions. Rather, the case explicitly leaves open the possibility of suit by a state when 'rights of the State falling within the scope of the judicial power' are at stake, a possibility later to become an actuality in, e.g., *National League of Cities*." Maj. op. at 11 n.14. That neatly expresses my point, not the majority's. The difference between *Massachusetts v. Mellon* and *National League of Cities* is that in the former only an injury to governmental powers was alleged while in the latter states and cities were required by federal statute to expend money. See *National League of Cities*, 426 U.S. at 846-47. That was the concrete injury in fact that conferred standing. The case now before us alleges only a usurpation of governmental powers and hence, on the teaching of the two Supreme Court decisions cited, is outside our jurisdiction. In short, *Massachusetts v. Mellon* is to *National League of Cities* as the present case is to the *Pocket Veto Case*.

B.

The Supreme Court's decisions about suits over "generalized grievances" are closely related to *Massachusetts v. Mellon* and require the same result here. The merits of the dispute offered us turn upon the interpretation of article I, section 7, clause 2 of the Constitution. That is a task for which courts are suited, and I would have no hesitation in reaching and deciding the substantive question if this were a suit by a private party who had a direct stake in the outcome. *The Pocket Veto Case*, 279 U.S. 655 (1929), was, of course, just such a suit.⁷ This action, how-

⁷ In *The Pocket Veto Case*, Congress passed a bill authorizing certain Indian tribes to present their claims against the United States to the Court of Claims. 279 U.S. at 672. The bill was presented to the President less than ten days before an intersession adjournment, *id.*; the President neither signed the bill nor returned it to the originating house, and the bill was not published as a law. *Id.* at 673. The Indian tribes took the position that the bill became law, and filed a petition in the Court of Claims raising various claims in accordance with the terms of the bill. The United States defended on the ground that the bill had not become law under article I, section 7, and the Court of Claims dismissed the petition for that reason. *Id.* The Supreme Court allowed a member of the House Committee on the Judiciary to appear as an amicus, but there was no suggestion that any legislator had standing to sue. *Id.*

Wright v. United States, 302 U.S. 583 (1938), followed the same format. Congress passed a bill giving the Court of Claims jurisdiction to adjudicate Wright's claim against the United States. 302 U.S. at 586. The United States opposed Wright's petition, arguing that the bill had never become law, and the Court of Claims agreed. *Id.* Moreover, the same pattern is evident in the other Supreme Court cases that have interpreted the presentation clause. *Edwards v. United States*, 286 U.S. 482 (1932), involved a private bill giving the Court of Claims jurisdiction to adjudicate Edwards' claim against

ever, is not. This is an action by representatives of people who themselves have no concrete interest in the outcome but only a "generalized grievance" about an allegedly unconstitutional operation of government. It is well settled that citizens, whose interest is here asserted derivatively, would have no standing to maintain this action.⁸ That being so, it is impos-

the United States; the Court of Claims certified to the Supreme Court the question whether the bill became law, given that it had been signed by the President after a final adjournment but within ten days of presentation. *Id.* at 485. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899), differs only in that there Congress passed a bill authorizing the Attorney General to bring suit in the Court of Claims to determine whether an award made by a United States Commission to *La Abra* had been obtained by fraud. 175 U.S. at 441. Consequently, in *La Abra* the private party, rather than the government, raised the defense that the bill had not become law, because signed by the President during a congressional recess. *Id.* at 446, 451. These cases provide no support for conferring standing to raise presentation clause issues on congressional plaintiffs.

⁸ It is also well settled that the states would not have standing to assert such generalized grievances on behalf of their citizens. *Massachusetts v. Mellon* also holds that a State, as *parens patriae*, may not "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof," because "it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government." 262 U.S. at 485-86. The Supreme Court recently reaffirmed that holding in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), while indicating that a state would have standing as *parens patriae* to "secure the federally created interests of its residents against private defendants." *Id.* This illustrates, rather dramatically one would think, that what is a sufficient injury in fact when asserted against a private defendant may, for reasons of separation of powers and federalism, be deemed

sible that these representatives should have standing that their constituents lack.

The Supreme Court has repeatedly rejected the proposition that one who sues as a citizen or taxpayer, alleging nothing more than that the government is acting unconstitutionally, has standing to sue. A naked claim that a constitutional violation has occurred, the Court has said, "would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract

insufficient to confer standing against a branch of the federal government. It is precisely these reasons of separation of powers and federalism that compel the parallel conclusion that injury to governmental powers does not constitute an injury in fact or a judicially cognizable injury, as the Supreme Court has elaborated those terms in connection with the article III standing requirements.

Lest this point be misunderstood, I emphasize that I do not read either *Mellon* or *Snapp* as holding that the prohibition on state *parens patriae* suits against the federal government is in all cases a constitutional limitation rather than a prudential one. In my view, that prohibition is a constitutional requirement where, as in *Mellon*, individuals within the state would lack standing to sue because they have suffered no injury that is judicially cognizable under article III. To permit Congress to confer standing on a state in such a case would be to authorize evasion of the constitutional standing requirements by allowing the state as a representative of its citizens to sue when those who are represented could not. But where private individuals could satisfy the injury in fact requirement of article III, there is no threat to separation of powers or to federalism in allowing Congress to confer *parens patriae* standing on the state as the representative of persons who have suffered a concrete injury and would themselves have standing. Consequently, in this second category of cases the rule is prudential and, although fully binding on the courts until Congress acts, may be eliminated by congressional enactments.

injury." *Schlessinger v. Reservists Committee To Stop the War*, 418 U.S. 208, 217 (1974). See *United States v. Richardson*, 418 U.S. 166 (1974); *Laird v. Tatum*, 408 U.S. 1 (1972); *Ex parte Levitt*, 302 U.S. 633 (1937). This is true even though "citizens are the ultimate beneficiaries of those [constitutional] provisions," *Reservists*, 418 U.S. at 227. Taxpayers face the same bar. In *Frothingham v. Mellon*, 262 U.S. 447, 486 (1923), the Court denied standing to a federal taxpayer who alleged that a spending bill was unconstitutional. Despite the fact that such bills may have the effect of taking money from the individual taxpayer and putting it to a purpose the Constitution interdicts, the general rule is still that the taxpayer lacks standing because he "suffers in some indefinite way in common with people generally." *Id.* at 488. See *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 476-81 (1982). Thus, these legislators lack standing in their individual, as opposed to their representative, capacities. The majority appears to concede that, insisting only upon representative standing.

Yet, the legislators on whom this court has bestowed standing have alleged only two things—an unconstitutional act and an impairment of their constitutional powers as a result of that act. It is clear that the citizens and taxpayers these legislators represent would not have standing if they alleged that the same unconstitutional act had impaired the official powers of their representatives. That would be true despite the fact that citizens and taxpayers are the "ultimate beneficiaries" of the constitutional powers their representatives possess. Indeed, that was precisely the argument that was rejected in *Reservists*, where the plaintiffs alleged that they, as

citizens and taxpayers, had been deprived "of the faithful discharge by members of Congress . . . of their duties as members of Congress, to which all citizens and taxpayers are entitled." 418 U.S. at 212 (*quoting* Petition for Certiorari at 46).

If the people of the United States would not have standing to bring this action (and it is undeniable that they would not), then how can the representative of the people have standing that their constituents do not? The only possible answer is that elected representatives have a separate private right, akin to a property interest, in the powers of their offices. But that is a notion alien to the concept of a republican form of government. It has always been the theory, and it is more than a metaphor, that a democratic representative holds his office in trust, that he is nothing more nor less than a fiduciary of the people. Indeed, as I show in Part III below, the Framers of the Constitution most certainly did not intend to allow suits such as this, which means they did not conceive of the powers of elected representatives as apart from the powers of the electorate. It is for that reason that Judge Scalia was entirely correct in stating that "no officers of the United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest. They wield those powers not as private citizens but only through the public office which they hold." *Moore*, 733 F.2d at 959 (Scalia, J., concurring).

Justice Frankfurter's separate opinion in *Coleman v. Miller*, 307 U.S. 433, 460 (1939), made the same point on behalf of himself and Justices Black, Roberts, and Douglas:

We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators [who challenged the state's ratification of an amendment to the United States Constitution] could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names.

Id. at 467. He said that injuries to voting procedures "pertain to legislators not as individuals but as political representatives executing the legislative process." *Id.* at 470. The Court majority did not disagree with this so far as suits in federal courts were concerned, but found an interest sufficient to confer standing only because the suit came from a state court that had found standing under state law. *Id.* at 446. Justice Frankfurter's analysis thus remains fully applicable to the action before us now.

This court now necessarily adopts as a premise to its reasoning that legislators, and other-members of government, have a private individual stake in their official powers that is separate from their fiduciary role. If not, it is utterly anomalous to allow the representative to sue when those he represents may not. One might as well drop the pretense, allow not only legislators but citizens and taxpayers to sue, and declare *Richardson*, *Reservists*, and *Frothingham* overruled and Justice Frankfurter's *Coleman* analysis rejected. Though the majority does not declare it,

that is what it has effectively accomplished for this circuit with the doctrine of congressional standing.

C.

The Supreme Court last Term handed down a decision that makes clear both the foundations of standing doctrine and the utter incompatibility of those foundations with this court's congressional-standing superstructure. In *Allen v. Wright*, 104 S. Ct. 3315 (1984), Justice O'Connor, writing for the Court majority, restated fundamentals to which we should revert every time an expansion of standing is contemplated.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." As the Court explained in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-476 (1982), the "case or controversy" requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

Id. at 3324. She specified the foundations of the doctrine: "the law of Art. III standing is built on a single basic idea—the idea of separation of powers."

Id. at 3325. Moreover,

the standing inquiry must be answered by reference to the Art. III notion that federal courts may exercise power only "in the last resort, and

as a necessity," *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 345 (1892), and only when adjudication is "consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process," *Flast v. Cohen*, 392 U.S. 83, 97 (1968). See *Valley Forge*, 454 U.S., at 472-473.

Id. The concept of congressional standing, born in this circuit and relied upon by the majority today, is inconsistent with every one of the criteria laid down in this passage from *Allen v. Wright*.

This may be seen by contrasting two opposing conceptions of the role of the federal courts in our polity. The first, and more traditional, view is that federal courts sit to adjudicate disputes between litigants; the power of the courts derives entirely from the necessity to apply the law to concrete controversies. Judges interpret the Constitution and apply it only out of necessity, and as a last resort, because the Constitution is law and may not be ignored by a court of law. In the course of adjudication, the court may have to declare a statute enacted by Congress unconstitutional or it may have to make the same declaration concerning an act of the President. That is an awesome power, but it is confined, limited, and tamed because it is exercised only when the need to decide a concrete controversy makes it inevitable. It is "merely the incidental effect of what *Marbury v. Madison* took to be the judges' proper business—'solely, to decide on the rights of individuals.'" Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 884 (1983) (footnote omitted). This view

of the powers of the federal judiciary is the one reiterated by the Supreme Court in *Allen v. Wright*.

Tocqueville understood the genius that underlay this definition of the judicial role:

[B]y leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

....

[T]he American judge is brought into the political arena independently on his own will. He judges the law only because he is obliged to judge a case. . . . It is true that, upon this system, the judicial censorship of the courts of justice over the legislature cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that species of contest which is termed a lawsuit. . . . The Americans have often felt this inconvenience; but they have left the remedy incomplete, lest they should give it an efficacy that might in some cases prove dangerous.

1 A. De Tocqueville, *Democracy In America* 106-07 (T. Bradley ed. 1945).

The competing view, which this court adopted with the congressional standing doctrine, is that "the business of the federal courts is correcting constitutional errors, and that 'cases and controversies' are at best convenient vehicles for doing so and at worst nui-

sances that may be dispensed with when they become obstacles to that transcendent endeavor." *Valley Forge*, 454 U.S. at 489. The *Valley Forge* Court could not have been clearer in rejecting this position: "This philosophy has no place in our constitutional scheme." *Id.* Yet, by means of its invention of standing for officials or branches of government to seek the continual arbitration of this court in their legal disputes with one another, this court has adopted, as the law of this circuit, the philosophy decisively rejected in *Valley Forge* and *Allen v. Wright*.⁹

⁹ The majority insists that *Allen v. Wright* has "nothing to do with 'governmental standing,'" but it concedes that *Allen v. Wright* emphasized that "the traditional standing criteria" are "grounded in, and are to be applied with reference to, the principle of separation of powers." Maj. op. at 11 n.14. The majority cannot have it both ways. My disagreement with the majority, put in the technical terms of traditional standing criteria, is over whether impairment of governmental powers is a judicially cognizable injury, that is, an "injury in fact" for purposes of article III. Just as *Massachusetts v. Mellon* demonstrates that considerations of federalism limit the category of judicially cognizable injury in controversies between a state and the United States, *Valley Forge* and *Allen v. Wright* show, not only in their general approach but in their specific application of the "traditional standing criteria," that considerations of separation of powers have the same limiting effect. In *Valley Forge* the Court held that the unconstitutional government conduct plaintiffs had alleged did not constitute a judicially cognizable injury, because "[a]lthough [they] claim that the Constitution has been violated, they claim nothing else. They fail to identify any personal injury suffered by the plaintiffs as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." 454 U.S. at 485. Yet, as the *Valley Forge* Court undoubtedly was aware, psychological consequences are familiar bases for claims in other legal contexts. The Supreme

The difference between the two conceptions of the judicial power may be stated more succinctly. In the traditional view, it is the necessity to decide a case that creates a court's duty to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177

Court's refusal to treat the psychological effects of allegedly unconstitutional government conduct as judicially cognizable "can only mean that the Court perceives that to confer standing in such cases would impermissibly alter its function." *Vander Jagt*, 699 F.2d at 1178 (Bork, J., concurring).

Similarly, in *Allen v. Wright*, although recognizing that the stigmatizing injury caused by racial discrimination will confer standing in some circumstances, 104 S. Ct. at 3327, the Court held that the plaintiffs did not have standing because they were not personally subject to the discrimination they challenged. *Id.* To treat this "abstract stigmatic injury" as cognizable, the Court stated, would transform the federal courts into "no more than a vehicle for the vindication of the value interests of concerned bystanders." *Id.* (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)).

The *Allen v. Wright* Court's treatment of the "fairly traceable" requirement even more clearly takes a separation-of-powers approach. The "fairly traceable" requirement "examines the causal connection between the assertedly unlawful conduct and the alleged injury." 104 S. Ct. at 3326 n.19. Yet, though the Court recognized that the challenged IRS tax-exemption practices might make some difference to the ability of plaintiffs' children to receive a desegregated education, and though it conceded that that harm is not only judicially cognizable but "one of the most serious injuries recognized in our legal system," *id.* at 3328, it nonetheless held that the causation requirement was not met. Why? Because, the Court said, "we rely on separation of powers principles to interpret the 'fairly traceable' component of the standing requirement." *Id.* at 3330 n.26. It is evident, then, that the majority's assertion that *Allen v. Wright* is irrelevant to governmental standing is unsupportable, and ignores both that opinion's general approach to the purposes of the standing doctrine and its application of the technical standing criteria.

(1803). In the new view, it is the court's desire to pronounce upon the law that leads to the necessity to create a case. This is a case created by the court. There would be no case or controversy here but for fabrication of the doctrine of congressional standing.

The court has fashioned a doctrine, in contradiction of *Allen v. Wright*, that transforms it from a tribunal exercising its powers "only in the last resort, and as a necessity" to a governing body for the entire federal government, available upon request to any dissatisfied member of the Legislative, Executive or Judicial Branch. Plainly, the courts of this circuit, if no other, are now not the last but the first resort. We have abandoned concern that our performance be "consistent with a system of separated powers" for a role of continual and pervasive intrusiveness into the relationships of the branches and, indeed, relationships within the branches. Nor can it be said even that the disputes we invite are those "traditionally thought to be capable of resolution through the judicial process," for no one ever thought, until we did, that courts should step directly between the other branches and settle disputes, presented in the abstract, about powers of governance. Moreover, as Alexander M. Bickel said, "the 'standing' and 'case' requirement creates a time lag between legislation and adjudication, as well as shifting the line of vision. Hence it cushions the clash between the Court and any given legislative majority" A. Bickel, *The Least Dangerous Branch* 116 (1962). In this respect, the standing requirement is like the requirement of ripeness, another of the traditional aspects of dispute resolution through the judicial process.

Congressional standing, which must expand into governmental standing for the President, the judiciary, and the states, if its rationale is honored, completely dispenses with the traditional, limited function of the judiciary and violates every one of the criteria for constitutional standing laid down by the Supreme Court in *Allen v. Wright*.

D.

Just as *Allen v. Wright* teaches that standing requirements are built around the constitutional concept of "separation of powers," *Massachusetts v. Mellon* suggests that those same requirements also play a vital part in the parallel constitutional concept of federalism. As separation of powers and federalism apply in a context like this one, the fundamental consideration appears to be the need to limit the role of the courts in the interplay of our various governmental institutions. The role of the courts is limited, not excluded, since a person denied a monetary benefit or other concrete interest could invoke the authority of the courts by asserting that a bill had become law because of the invalidity of a pocket veto. The difference between a judicial function limited by the doctrine of standing and one not so limited lies in the relative dominance of the judicial branch, in the timing of judicial action, and in the number of constitutional principles generated that curb the powers and freedoms of other governmental units.

As Judge Scalia recently observed, "[t]he degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon *when* and *at whose instance* they are permitted to address them." Scalia, *supra*, 17 Suffolk U.L. Rev. at 892. A federal

judiciary that is available on demand to lay down the rules of the powers and duties of other branches and of federal and state governments will quickly become the single, dominant power in our governmental arrangements. The concept of the fragmentation of power, upon which both the ideas of the separation of powers and of federalism rest, will be, if not destroyed, at least very seriously eroded. See generally *The Federalist* No. 51, at 351 (J. Madison) (J. Cooke ed. 1961) (explaining that both separation of powers and the division of power between state and federal governments serve to protect the liberty of the governed by dividing the power of government). A majority of Supreme Court Justices will have something very like the power to govern the nation by continuously allocating powers and inhibitions to every other governmental institution. As Chief Justice John Marshall put it in a speech to Congress:

A case in law or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision. If the judicial power extended to every *question* under the constitution, it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States, it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary.

Speech of the Honorable John Marshall to the United States House of Representatives, 18 U.S. (5 Wheat.)

Appendix at 3, 16 (1820). The concept of standing prevents this undesirable centralization of authority by severely limiting the occasions upon which courts are authorized to lay down the rules for governments and institutions of government.

Standing requirements, like the requirement of ripeness, also delay the invocation of judicial power. This means that there is time for the real impact of laws and actions to become clear, thus making the constitutional inquiry less abstract and more focused. The law is given a chance to go into effect and have some impact upon persons in the society so that its constitutionality can be judged according to its real effects upon real persons in real circumstances. The courts are enabled to think about real interests and claims, not words. Constitutional adjudication should operate upon the basis of realities, not general propositions.

A firm standing concept also decreases the number of occasions upon which courts will frame constitutional principles to govern the behavior of other branches and of states. There will thus be fewer constitutional principles of that sort in the system. That, too, is a benefit. The business of government is intensely practical and much is accomplished by compromise and accommodation. The powers of the branches with respect to one another, as well as the reciprocal powers of the federal and state governments, ebb and flow as the exigencies of changing circumstances suggest. It is proper and healthful that this should be so. These matters should not be always settled at the outset by declarations of abstract principle from an isolated judiciary not familiar with the very real and multitudinous problems of governing. Fluid relationships should not be frozen and the play

removed from the joints of government. That is precisely the tendency that must come into being, however, if elimination of standing requirements permits the explosive proliferation of constitutional declarations about governmental powers.

Our democracy requires a mixture of both principle and expediency. As Professor Bickel put the matter:

[T]he absolute rule of principle is . . . at war with a democratic system. . . .

No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden.

A. Bickel, *supra*, at 64. While all branches of government are obliged to honor the Constitution, the declaration of constitutional principle with binding effect is primarily the task of the federal courts. If the federal courts can routinely be brought in to branches of the federal government disagree, every time the federal and the state governments contend, then we will indeed become a "principle-ridden," in fact a judge-ridden, society. Traditional standing requirements are a principal barrier between us and that unhappy condition.

The arguments just made indicate that, except where a conventional lawsuit requires a judicial resolution, much of the allocation of powers is best left to political struggle and compromise. Indeed, it was to facilitate and safeguard such a continuing process that the checks and balances of the Constitution were created. It was to allow room for the evolution of

the powers of various offices and branches that the Constitution's specification of those powers was made somewhat vague. The Framers contemplated organic development, not a structure made rigid at the outset by rapid judicial definition of the entire subject as if from a blueprint. The majority finds this plan inadequate and the idea of political struggle between the political branches distasteful, at best "time-consuming," at worst involving "retaliation." Maj. op. at 16. Just so. That is what politics in a democracy is and what it involves. It is absurd to say, as the majority does, that a "political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case." *Id.* That is a judgment about how the Constitution might better have been written and it is not a judgment this or any other court is free to make. Moreover, I know of no grave consequences for our constitutional system that have flowed from political struggles between Congress and the President. This nation got along with that method of resolving matters between the branches for 185 years, until this court discerned that the nation would be better off if we invented a new role for ourselves. And, of course, it is true that matters of government will be much neater, if less democratic, to the extent that judges undertake to decide them in the first instance. One must not, furthermore, take seriously the majority's promise that this court's congressional standing doctrine "will help to preserve, not defeat, the separation of powers." Maj. op. at 16. As I have shown, there is no principled way to limit the judicial power the majority would have us take for our own,

and the result must inevitably lead to the destruction, not the preservation, of the separation of powers.

As I show next, those who framed, proposed, and ratified our Constitution chose a different mixture of principle and compromise for our polity, a different process of growth, struggle, and accommodation when they chose the role to be played by courts.

III.

Though we are obligated to comply with Supreme Court precedent, the ultimate source of constitutional legitimacy is compliance with the intentions of those who framed and ratified our Constitution. The doctrine of congressional or governmental standing is doubly pernicious, therefore, because it flouts not only the rules enunciated and applied by the Supreme Court but the historical meaning of our basic document as well. The criteria of *Allen v. Wright* are not simply Court-made; they reflect and express the design of the Framers of the Constitution. No other conclusion is possible from a consideration of what the Framers did and did not do.

At the outset of the Constitutional Convention, Governor Randolph presented a series of resolutions framed by the Virginia delegation and commonly called the Virginia Plan. As Farrand says, "[t]hese resolutions are important, because amended and expanded they were developed step by step until they finally became the constitution of the United States." M. Farrand, *The Framing of the Constitution of the United States* 68 (1913). The eighth resolution proposed that the new national legislature be controlled by placing a veto power in a Council of Revision consisting of the executive and "a convenient number of the National Judiciary." 1 M. Farrand, *The Records*

of the *Federal Convention of 1787*, at 21 (1st ed. 1911). A Council so composed would be controlled by the votes of the judiciary, and the latter would in that way heavily influence, and often control, the relationship between the President and Congress. By vetoing or refusing to veto, the judiciary could uphold one branch against the other and make itself the umpire of the constitutional system, not in the last resort or as a necessity, but on a continuing, front-line basis. The judiciary would, as well, be drawn up immediately next to the legislative process and decide what was to be law and what was not on the basis of abstract reasoning, without the benefit conferred by the passage of time, the cooling of passions, and an issue framed in a concrete factual setting.

We do not, of course, know all of the reasons why the members of the Convention repeatedly defeated the proposal for a Council of Revision.¹⁰ But we do

¹⁰ The Council of Revision was initially rejected when Gerry's motion "which gave the Executive alone without the Judiciary the revisionary control on the laws" was adopted. 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 104 (1st ed. 1911) (June 4, 1787). On three occasions thereafter Madison and Wilson renewed the proposal for the Council of Revision, each time without success. 1 M. Farrand, *supra*, at 138, 140 (June 6, 1787); 2 M. Farrand, *supra*, at 73, 80 (July 21, 1787); 298 (Aug. 15, 1787). Gerry raised the objection that the power of judicial review was sufficient to protect the judiciary from "encroachments on their own department," and protested that review of public policy was no part of the judicial function. 1 M. Farrand, *supra*, at 97-98. King and Dickinson argued in addition that the proposal would dilute the executive's unitary character and make it less accountable for the use to which this power was put. *Id.* at 139, 140. Strong worried that the judges might be unable to be impartial in interpreting the laws if they were given a

know the effect the Council would have had upon our constitutional arrangements and upon the role of the courts—effects remarkably similar to those that would result from the final adoption of this circuit's doctrine of governmental standing—and we do know that the idea was rejected.

There are, however, more, and stronger, inferences to be drawn from the work of the Convention than merely those that may be drawn from the rejection of the Council of Revision. We know, for example, that the Convention drafted article III of the Constitution in a way that does not contemplate suits directly between the branches of government. Article III extends "judicial power" to various categories of "cases" and "controversies," which itself indicates the Framers had in mind a role for the judiciary similar to the common-law function with which they were familiar. It is perhaps more noteworthy that article III creates, as specific, independent categories of federal judicial power, "controversies" between states, between a state and citizens of another state, and so on. Given that listing, it is incredible that Framers who intended to extend judicial power to direct controversies between Congress and the President failed to include so important a category in their recitation.

The drafters, moreover, singled out especially sensitive categories of judicial power for the original jurisdiction of the Supreme Court. Thus, article III

part in making them, 2 M. Farrand, *supra*, at 75, Luther Martin pointed out that the judges could not be presumed more expert in legislative affairs than the legislators, *id.* at 76, and Ghorum urged that the judges might well sacrifice the executive rather than support him against the legislature. *Id.* at 79.

gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." Had they contemplated that the federal courts would regularly supervise relationships between Congress and the President, the Framers would undoubtedly have placed that class of cases within the Supreme Court's original jurisdiction. That inference is made certain by the fact that article III contemplated that "inferior [federal] courts" might not be established at all. In fact, federal question jurisdiction was not given to the lower federal courts for almost a century after the framing of the Constitution. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. That fact also demonstrates that the political branches were not to sue each other. The Framers simply cannot have contemplated that disputes directly between Congress and the President would be decided in the first instance in any of the thirteen existing state court systems.

It is notorious that the Constitution nowhere mentions any power of judicial review. That fact has been much bruited in the never-ending debate over the legitimacy of the power asserted in *Marbury v. Madison*. It is entirely conceivable, of course, that Framers who thought the Constitution would be law, and who made it supreme law in article VI of the Constitution, simply assumed that the Constitution would be applied by the courts when cases arose requiring it. Indeed, there are a number of comments preserved from the Convention debates that suggest this is precisely what some members did assume.¹¹ But it is absolutely inconceivable that Fram-

¹¹ See, e.g., 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 97 (1st ed. 1911) (remarks of Gerry);

ers who intended the federal courts to arbitrate directly disputes between the President and Congress should have failed to mention that function or to have mentioned judicial review at all. The statesmen who carefully spelled out the functions of Congress and the President and the details of how the executive and legislative branches might check each other could hardly have failed even to mention the judicial lynchpin of the constitutional system they were creating—not if they had even the remotest idea that the judiciary was to play such a central and dominant role.

The intentions of the Framers need not be derived entirely from the records of the Constitutional Convention, nor even from the structure and language of the document itself. Courts may and frequently do look to evidence of what was said and done immediately after the original act of composition. Consider, for example, Hamilton's well-known defense of the institution of judicial review in *The Federalist* No. 78. That defense, in essence, is that the limitations on the constitutional powers of Congress "can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void." *The Federalist* No. 78, at 524 (A. Hamilton) (J. Cooke ed. 1961). It is important that Hamilton's discussion of judicial review is immediately preceded by a passage in which he repeatedly emphasizes the comparative impotence of the judiciary. The enormous power that

109 (remarks of King); 2 M. Farrand, *supra*, at 76 (remarks of L. Martin); 93 (remarks of Madison); 299 (remarks of Gouverneur Morris). But see 2 M. Farrand, *supra*, at 298 (remarks of Mercer); 299 (remarks of Dickenson).

the judiciary would acquire from jurisdiction over inter- and intra-branch disputes would have made a mockery of his quotation of Montesquieu to the effect that "of the three powers above mentioned [the others being the legislative and the executive], the JUDICIARY is next to nothing." *Id.* at 523 n.* (*quoting* Spirit of Laws, vol. 1, at 186). Had Hamilton even suspected that disagreements between the popular branches over their respective powers were "cases" or "controversies" within the meaning of article III, it is not to be believed that he would have described the judiciary as "from the nature of its functions, . . . always . . . the least dangerous to the political rights of the constitution" *Id.* at 522. In fact, the judiciary would be the branch most dangerous to those political rights.

Indeed, the only discussion in *The Federalist* of possible judicial involvement in disputes between the President and Congress comes in connection with the impeachment power. The problem, Hamilton says, was to create "[a] well constituted court for the trial of impeachments." *The Federalist* No. 65, at 439 (A. Hamilton) (J. Cooke ed. 1961). He defines that court's jurisdiction in terms of those offenses that derive from "the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done . . . to the society itself." *Id.* He then considers, and rejects, the proposal that the Supreme Court should have been given this jurisdiction, in part on the grounds that it lacks the independence and authority to discharge this delicate task without a dangerous confrontation with one branch or the other. *Id.* at 441. The majority's doctrine of congressional stand-

ing brings the two political branches before us as adversaries just as much as would giving trials of impeachments to the judiciary. Today's dispute is only over a pocket veto that has little continuing importance, but the invitation we now issue will ultimately bring before us the most profound and agitated issues of politics and government. The task of umpiring disputes between the coordinate branches which this court has agreed to undertake is no more suited to judicial competence than trial by impeachment, and raises the same or greater dangers of repeated and head-on confrontation with the other branches that underlie Hamilton's objections.¹² Thus, the whole tenor of Hamilton's authoritative discussion of the Judicial Branch is completely inconsistent with the existence of the jurisdiction the majority claims to possess.

A similar point may be made about Hamilton's discussion of the President's veto power in *The Federalist* No. 73. Hamilton asserts that the use of the veto power to prevent "the passing of bad laws" was

¹² Tocqueville saw this point as well. After speaking of the American practice of leaving the invocation of judicial power to contests of private interest, he said:

I am inclined to believe this practice of the American courts to be at once most favorable to liberty and to public order. If the judge could attack the legislator only openly and directly, he would sometimes be afraid to oppose him; and at other times party spirit might encourage him to brave it at every turn. The laws would consequently be attacked when the power from which they emanated was weak, and obeyed when it was strong; that is to say, when it would be useful to respect them, they would often be contested; and when it would be easy to convert them into an instrument of oppression, they would be respected.

1 A. de Tocqueville, *supra*, at 107.

only a secondary purpose of its adoption by the Framers. "The primary inducement to conferring the power in question upon the executive," he says, "is to enable him to defend himself." *The Federalist* No. 73, at 495 (A. Hamilton) (J. Cooke ed. 1961). The risk is that "he might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote." *Id.* at 494. Thus, "the case for which the veto power is chiefly designed [is] that of an immediate attack upon the constitutional rights of the executive." *Id.* at 497. But, if this court's governmental standing doctrine is correct, Hamilton has described a power that is largely superfluous. The President would not need to defend himself through the veto power—he could at once challenge any "vote[s]" or "resolutions" that endangered his "constitutional rights" as President in the courts.

Even the Anti-Federalists did not urge the existence of such unbounded judicial power as an objection to the proposed constitution. The most detailed Anti-Federalist critique of judicial review was supplied by the pseudonymous Brutus, whose principal argument was that the federal courts would by constitutional interpretation bring about "an entire subversion of the legislative, executive and judicial powers of the individual states." H. Storing, *The Complete Anti-Federalist* 2.9.139 (1981). His description of judicial review is revealing: when the legislature enacts laws that the court judges to be unconstitutional, "the court will take no notice of them," and this will discourage the legislature from passing "laws which they know the courts will not execute." *Id.* at 2.9.148. Had Brutus thought the courts were free not only to refuse to execute an unconstitutional law, but to review it for unconstitu-

tionality where no question of execution had arisen, his argument would have gained immeasurably from some mention of that fact. There is none.

It must be concluded, therefore, that those who drafted, proposed, and ratified the Constitution did not intend that the judiciary should entertain suits directly between the political branches of the national government. The judiciary they envisioned was to play no such dominant role in affairs of state. Their intention precludes the doctrine of standing devised by this court to thrust the judiciary into that leading position.

IV.

To make its standing doctrine more palatable this court has adopted a doctrine of remedial or equitable discretion. This doctrine permits the court to say that a congressional plaintiff has standing, and hence that the court has jurisdiction, and yet refuse to hear the case because the court is troubled by the separation-of-powers implications of deciding on the merits. We have no such equitable discretion, however, for "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). By claiming that discretion, the court has created for itself a kind of certiorari jurisdiction—which it took an act of Congress to create for the Supreme Court. There would be no need to violate the settled principle of federal jurisprudence that a court with jurisdiction may not decline it if the article III limits on this court's jurisdiction were adhered to.¹³

¹³ The standing requirements of article III are jurisdictional—discretion plays no part in their application. The

The introduction of discretion into the standing inquiry is therefore an attempt to change the very nature of that doctrine. Indeed, this court has plainly indicated as much: "The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion. . . . [T]his test avoids the problems engendered by the doctrines of standing, political question, and ripeness." *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981). Indeed it does. The equitable discretion doctrine avoids the problems of standing, political question, and ripeness by ignoring them. But those problems are real; they relate to the properly limited role of the courts in a democratic polity. To avoid them in this way is to say that the limit upon the courts' capacity to intrude upon areas of democratic governance comes not from the Constitution but entirely from the courts' sense of fitness. That is hardly an adequate safeguard. Moreover, this court has no right to avoid the problems of standing. They arise in large part from the Constitution and the Supreme Court has made it abundantly clear, in cases such as *Valley Forge* and *Allen v. Wright*, that they must be addressed, and addressed with the separation of powers in mind.¹⁴ The doctrine of reme-

prudential standing requirements are no less jurisdictional. I am aware of no case in which the Court has held that a lower federal court may decide that those requirements need not be satisfied if the court thinks it would be inequitable to deny standing.

¹⁴ The only justification for *Riegle's* claim that separation-of-powers considerations are irrelevant to the standing inquiry was an inference from the fact that the Supreme Court

dial discretion removes separation-of-powers considerations from the jurisdictional inquiry and converts them into mere interests to be balanced. Thus, the doctrine relegates separation of powers to second-class status and subordinates the structure of our constitutional system to the discretion of this court. It is impossible for me to view that prospect with equanimity.

It is plain on the face of these developments that what we are observing constitutes a major aggrandizement of judicial power. Any lingering doubts on this score are laid to rest by this court's stated presumption in favor of exercising discretion to decide a case when, if a decision on the merits were withheld, "non-frivolous claims of unconstitutional action would go unreviewed by a court." *Riegle*, 656 F.2d at 882; *see also Moore*, 733 F.2d at 956; *Vander Jagt*, 699 F.2d at 1170, 1174 n.23. The function of the article III case-or-controversy limitations, includ-

vacated our judgment finding standing in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *judgment vacated on other grounds*, 444 U.S. 996 (1979), on grounds of nonjusticiability, with some Justices relying on the ripeness doctrine and others on the political question doctrine. *Riegle*, 656 F.2d at 880. That inference was dubious to begin with, for Justices who found the case nonjusticiable on other grounds had no need to discuss standing. The evidence, which I have already recited in Part II-C *supra*, that the Court now regards separation-of-powers considerations as inseparable from the constitutional component of standing analysis, consists of explicit statements by the Court, rather than inferences from statements the Court did not make because there was no need to make them. Therefore, even if *Riegle* was a justifiable departure from this court's established standing analysis, which I do not believe, there is no warrant whatsoever for adhering to that departure in the wake of the invalidation of the premise on which it rested.

ing the standing requirement, is, however, precisely to ensure that claims of unconstitutional action will go unreviewed by a court when review would undermine our system of separated powers and undo the limits the Constitution places on the power of the federal courts. The Supreme Court has repeatedly said that standing is not "a requirement that must be observed only when satisfied." *Valley Forge*, 454 U.S. at 489. See also *Reservists*, 418 U.S. at 227 ("[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing"); *Richardson*, 418 U.S. at 179 ("the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process"). In each of these cases the Court was faced with the contention that if the plaintiff was not permitted to litigate the issue, no one could. In none of those cases did the Court make the response which, if the governmental standing doctrine were correct, would have been most natural, obvious and ready to hand: that, while citizens or taxpayers have no standing to raise abstract claims about the allegedly unconstitutional operation of government, their representatives undoubtedly would. If the doctrine of governmental standing were correct, there would always be some governmental official or entity whose powers were affected by alleged violations of any particular constitutional provision. In *Richardson*, to take a single example, members of Congress could have sued to force the President to publish the budget of the Central Intelligence Agency, or to force Congress to force the President to do so, on the grounds that they had been denied an opportunity to vote to appropriate or not to appropriate funds for specific

CIA programs by virtue of the statute permitting the Agency to account for its expenditures "solely on the certificate of the Director." 50 U.S.C. § 403j(b). A similar analysis would apply to *Reservists* and *Valley Forge*. The concession that there are constitutional questions that cannot be litigated because of standing requirements is, therefore, an additional proof that there is no congressional or governmental standing.

The limits that standing places upon judicial power do not mean that many important questions of constitutional power will forever escape judicial scrutiny. Many of the constitutional issues that congressional or other governmental plaintiffs could be expected to litigate would in time come before the courts in suits brought by private plaintiffs who had suffered a direct and cognizable injury. That is entirely appropriate, and it belies the argument that this court's governmental standing doctrine is necessary to preserve our basic constitutional arrangements.

At bottom, equitable discretion is a lawless doctrine that is the antithesis of the "principled decisionmaking" that was invoked to justify its manufacture. A doctrine of remedial discretion more than "suggests the sore of rudderless adjudication that courts strive to avoid," *Vander Jagt*, 699 F.2d at 1175—it is rudderless adjudication. A sampling of the cases in which this doctrine has been invoked makes that quite clear. For example, in *Riegle* the court suggested that the equitable discretion doctrine should apply only to congressional plaintiffs, not to private plaintiffs. 656 F.2d at 881. Indeed, the *Riegle* court said that the fact that a private plaintiff would have standing to sue would weigh against hearing the congressional plaintiff on the merits, because under those circumstances the unconstitutional action or statute would

not go unreviewed. *Id.* In *Vander Jagt*, a group of congressmen sued their fellow legislators, and they sued both as congressmen and as individual voters—that is, as private plaintiffs. 699 F.2d at 1167 n.1. The court held that the plaintiffs had standing both as congressmen and as voters. *Id.* at 1168, 1169 n.4. Nonetheless, the court dismissed *all* the claims because “this case raises separation-of-powers concerns similar to *Riegle’s*.” *Id.* at 1175. Had it followed *Riegle*, the *Vander Jagt* court would have reached the merits of the private plaintiffs’ claims—a result I would have found even more objectionable than what the court actually did, *see id.* at 1183 n.3 (Bork, J., concurring), but one which would at least have had the virtue of predictability. It is hardly an argument in favor of remedial discretion that whatever standards one panel fashions the next is free to disregard on “equitable” grounds.

Ultimately, the doctrine of equitable discretion makes cases turn on nothing more than the sensitivity of a particular trio of judges. One cannot, unfortunately, have any solid grounds for supposing that these aesthetic judgments, though subjective and varying, will at least mark out an irreducible realm of “startling[] unattractive[ness].” *Vander Jagt*, 699 F.2d at 1176. As the spectacle of public officials suing other public officials over abstract constitutional questions becomes familiar, the taint will wear off, and what seemed unattractive will appear inevitable. Alexander Pope’s dictum, though grown trite, is too apt to ignore: “Vice is a monster of so frightful mien/As to be hated needs but to be seen;/Yet seen too oft, familiar with her face,/We first endure, then pity, then embrace.” *An Essay on Man, Epistle II*, l. 217. The combination of congressional standing and equitable discretion will very probably prove to

have been but a way-station to general, continual, and intrusive judicial superintendence of the other institutions in which the Framers chose to place the business of governing.

V.

The majority maintains that its holding that appellants have standing is supported by decisions of the Supreme Court and required by binding precedent in this circuit. Neither of those claims withstands analysis.

A.

The principal Supreme Court decisions the majority deploys in support of its position are *Coleman v. Miller*, 307 U.S. 433 (1939); *United States v. ICC*, 337 U.S. 426 (1949); *Chapman v. FPC*, 345 U.S. 153 (1953); *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); and *INS v. Chadha*, 103 S. Ct. 2764 (1983). An inspection of these cases, however, reveals that they do not support the revolutionary proposition for which they are conscripted.

The majority states that *Coleman v. Miller*, 307 U.S. 433 (1939), proves that “a claim that is founded on a specific and concrete harm to [lawmaking] powers” is “judicially cognizable.” Maj. op. at 13-14. *Coleman* proves nothing of the kind. But the case is not merely inapposite to the point for which the majority cites it. In fact, the Supreme Court’s reasoning affirmatively demonstrates that the majority is wrong and that the appellants before us have no standing to maintain this action.

In *Coleman*, a group of Kansas State Senators who had voted to reject a proposed amendment to the federal Constitution challenged in the state courts the validity of the Lieutenant Governor’s tie-breaking vote in favor of ratification. 307 U.S. at 436. The

Supreme Court found that they had standing, upon a grant of certiorari, to contest the merits of an adverse decision by the Kansas Supreme Court. But Chief Justice Hughes' opinion for the majority made it clear that the Court accorded standing to obtain review of a federal constitutional question only because there existed a legal interest accepted as sufficient for standing by the highest state court. Thus, the opinion held that the state senators had "an interest in the controversy which, *treated by the state court as a basis for entertaining and deciding the federal questions*, is sufficient to give the Court jurisdiction to review that decision." *Id.* at 446 (emphasis added).

The critical importance of state court standing to obtain federal constitutional review was made even clearer by the distinction the Chief Justice drew between *Leser v. Garnett*, 258 U.S. 130 (1922), and *Fairchild v. Hughes*, 258 U.S. 126 (1922). Both cases involved suits by citizens to have the nineteenth amendment declared not a part of the Constitution. The only difference between the cases relevant to the standing issue was that *Leser* was brought in the Maryland courts and *Fairchild* was brought in a federal court.¹⁵ As the Chief Justice pointed out, the

¹⁵ The majority offers a different basis for distinguishing between *Leser* and *Fairchild*—the fact that the plaintiff in *Leser* was a citizen of Maryland, which had refused to extend suffrage to women, while the named plaintiff in *Fairchild* was a citizen of New York, which had amended its constitution to grant women suffrage. See maj. op. at 14 n.15. The majority finds this difference a "more plausible basis for distinguishing the two cases," but that would be irrelevant even if it were true. The question is not how we would distinguish those cases, but how the *Coleman* Court distinguished them, and it is clear that the basis offered by Chief Justice Hughes was

Supreme Court on the same day in opinions written by the same Justice (Brandeis, J.) took jurisdiction over the Maryland case, stating that the laws of Maryland authorized the suit, but held that the federal court was without jurisdiction because plaintiffs, having only a general interest in government according to law, an interest possessed by every citizen, had no standing. 307 U.S. at 440.

Justice Frankfurter wrote separately for himself and three other Justices to deny that the plaintiffs in *Coleman* had standing. Frankfurter clearly thought that a legislator's interest in his official powers could not confer standing in federal courts because such interests were not "matters of 'private damage.'" 307 U.S. at 470. He expressly agreed with the idea that

that in *Leser* the citizen's suit was commenced in state court and allowed to go forward under the laws of the state, whereas in *Fairchild* the suit was brought in federal court. Indeed, the Chief Justice made no mention whatsoever of the fact that the only named plaintiff in *Fairchild* was a citizen of New York. He described *Fairchild* as simply "a suit by citizens of the United States," 307 U.S. at 440.

The majority concludes that the *Coleman* Court shared its novel rationale for distinguishing *Leser* from *Fairchild*, because the Court said that "[t]he interest of the plaintiffs in *Leser v. Garnett* as merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case." 307 U.S. at 441. The quoted language implies, at most, only that the *Coleman* Court was unwilling to take the position that in any case in which a state court determined that the plaintiffs had standing, no matter how remote, abstract, or generalized the plaintiffs' grievance might be, the Supreme Court would be bound to review the state court's decision if it fell within the Court's statutory jurisdiction. That does not alter the fact that the *Coleman* Court perceived the interest of the Kansas legislators as of a type that would not give them standing to bring suit in federal court.

standing under Kansas law could confer standing in the United States Supreme Court. *See id.* at 465-66. He thus rejected the distinction made by *Leser* and *Fairchild* and adopted by Chief Justice Hughes in *Coleman*.¹⁶ The Court majority's adoption of that dis-

¹⁶ It may be that *Coleman* drew the distinction it did, and thus allowed review of a claim heard in a state court under state standing rules more permissive than federal standing rules, because to deny review in such cases would leave in place a body of state court interpretations of the federal Constitution that the Supreme Court could never pass upon. The result might be federal constitutional law that differed from state to state. The problem of erroneous or differing state court interpretations of the United States Constitution and laws can be avoided only if the Supreme Court accepts the state's basis of standing as sufficient for review or if it requires state courts to apply federal standing rules in order to entertain suits based on federal law.

Doremus v. Board of Education, 342 U.S. 429 (1952), can be read as adopting the latter course. In *Doremus*, the Court characterized the state court's opinion as "advisory" and dismissed the appeal (from a declaratory judgment that a state statute was constitutional) on the grounds that "because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." 342 U.S. at 434 (emphasis added). The emphasized language suggests that the Court might have vacated a state court judgment enjoining enforcement of the statute, but that the Court would simply dismiss an appeal from a state court judgment upholding the challenged statute (as the *Doremus* Court in fact did). If *Doremus* means that the Supreme Court has adopted this approach as one of general applicability, it would follow that there is yet another reason why *Coleman* lends no support to the majority's position: even *Coleman*'s narrow holding would then no longer be good law because that holding expressly rests on the state court's decision that the state senators had standing to sue under state law.

inction shows not only that *Coleman*'s finding of standing is confined to cases where states recognize standing in their own courts but demonstrates also that the same plaintiffs would not have standing in a federal court. All nine Justices in *Coleman* agreed to the latter proposition. The case before us was brought in a federal court. *Coleman* proves, therefore, that the plaintiffs here have no standing. It is, to say the least, distinctly peculiar that the majority cites the case for its own contrary conclusion.

The majority draws from *United States v. ICC* the proposition that courts may not avoid justiciable controversies "simply because one or both parties are coordinate branches of the government." Maj. op. at 10. In whatever limited sense this statement may be true, it has no application where the only alleged basis for the plaintiff's standing is its powers as one of the contending branches, and hence the statement is not relevant to the present case. This is a suit in which the standing of appellants rests exclusively on an alleged impairment of their respective governmental powers. *United States v. ICC* was not that at all. Though the government was appealing an order of the ICC, its real opponents were railroads from which it sought reparations in its proprietary, not its governmental, capacity. 337 U.S. at 428. Thus the government's standing did not rest on impairment of governmental powers. As the Court said, "[t]he basic question is whether railroads have illegally exacted sums of money from the United States." *Id.* at 430. Moreover, because the railroads were present as "the real parties in interest," *id.* at 432, the situation in *United States v. ICC* was essentially the same as when the United States petitions for a writ of mandamus directed to a district court. Despite the dis-

strict judge's name on the petition, the real adversary is the party on the other side of the litigation. It is not an action by the Executive Branch against part of the Judicial Branch to determine their respective governmental powers. So, too, *United States v. ICC* was not a suit by the Executive Branch against an independent agency over their respective governmental powers.

Furthermore, because the ICC is an independent agency, the President had no power to terminate the controversy by ordering the ICC to reverse its decision denying the government money damages. See *infra* at pp. 50-51. That fact constitutes an additional reason for the Court's conclusion (which the Court rested on the presence of a dispute between the government and the railroads, see 337 U.S. at 430-31) that "the established principle that a person cannot create a justiciable controversy against himself has no application here." *Id.* at 431. It also suggests that the government's standing might not have been sustained by the Court but for the ICC's status as an independent agency.

In *Chapman*, which the majority construes as allowing standing based on infringement of governmental powers, see maj. op. at 11, the Secretary of the Interior and an association of rural electric cooperatives challenged the FPC's issuance of a license to a power company to build a hydroelectric station at a site that Congress allegedly "reserved . . . for public development and so has placed . . . beyond the licensing power of the Federal Power Commission." 345 U.S. at 156. The Secretary claimed that both his general duties relating to conservation of water resources and his "specific interest" in fulfilling his statutory duty to market public hydroelectric power

were "adversely affected by the Commission's order." *Id.* The Court neither endorsed nor repudiated that argument. Its entire discussion of standing reads as follows:

We hold that petitioners have standing. Differences of view, however, preclude a single opinion of the Court as to both petitioners. It would not further clarification of this complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations, to set out the divergent grounds in support of standing in these cases.

Id.

It is hard to imagine a holding more confined to its facts—for the Court supplied no rationale for its decision. But, to begin with, we may observe that in *Chapman* there were private parties on both sides of the dispute, the one defending its right to the license it had been granted by the Commission, the other claiming that its right to a preference in sales of surplus power by the Secretary had been impaired. Since the court held that the electric cooperatives had been aggrieved, within the meaning of 16 U.S.C. § 8252, by the Commission's action, its parallel holding as to the Secretary, who had been allowed to intervene in administrative proceedings before the Commission, see *United States v. FPC*, 191 F.2d 796, 799 (4th Cir. 1951), was not strictly necessary to decide the merits.

Furthermore, because the site was clearly within the public domain,¹⁷ the court may have agreed with

¹⁷ Justice Douglas, joined in dissent by Justice Black and Chief Justice Vinson, pointed out that the Roanoke Rapids

the lower court that "the United States, representing the people of the country, may have an interest in the construction of a power project," *United States v. FPC*, 191 F.2d at 800, while disagreeing with the lower court's contention that that fact "does not confer upon the Secretary of the Interior any authority to go into court for its protection." *Id.* That would make *Chapman* an instance in which the Secretary was allowed to sue on behalf of the United States over the federal proprietary interest in a site within the public domain. In this connection, it is striking that the lower court in *Chapman* read *United States v. ICC* as "hold[ing] merely that suit by the United States to protect its interests is not precluded merely because the suit must be brought against a governmental agency. Nothing is said to indicate that an officer of the government may go into court against such agency to protect the public's interest with respect to a matter as to which he is charged with

site was a part of the public domain, because (1) the Roanoke is a navigable stream over which Congress has plenary power, (2) the water power inherent in a navigable stream belongs to the federal government, and (3) the dam sites on a navigable stream are public property even if the title to the streambed is in private hands. 345 U.S. at 176. Justice Douglas thought that the public nature of the site suggested, on the merits, that Congress had not intended to authorize private development. *See id.* at 177. The Court majority disagreed, not on the grounds that the site was not in the public domain, but because it viewed the pertinent legislation as "a legislative finding that the proposed projects, no matter by whom they may be built, are desirable and consistent with the congressional standards for the ordered development of the Nation's water resources." *Id.* at 163. It is clear, then, that the Secretary was in substance alleging that rights over property in the public domain had, by the action of the Commission, improperly been vested in private hands.

no duty or responsibility." *Id.* That *Chapman* may have turned simply on whether or not the Secretary was in fact charged with the duty of representing the United States' property interest in such matters—in which event, it is clear that had the Secretary not been a proper party, the Solicitor General would have been. As in *United States v. ICC*, then, standing was in all likelihood based on the government's proprietary interests rather than on infringement of the Secretary's governmental powers.

That suit by *some* member of the executive branch was appropriate is also clear, because *Chapman* involved neither an inter- nor intra-branch dispute. The FPC was created as an independent agency. *See* 16 U.S.C. § 792 (1982) (Commissioners appointed by President by and with the advice of the Senate for terms of five years); *see also* 44 U.S.C. § 3502(10) (1982) (listing the Federal Energy Regulatory Commission (the successor to the FPC) as an "independent regulatory agency"). Among other things, that means that the Commissioners are "officer[s] who occupy no place in the executive department and who exercise[] no part of the executive power vested by the Constitution in the President." *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). The dispute in *Chapman*, then, was a dispute between the Executive Branch and an agency outside the Executive Branch. That agency was a creature of Congress, charged with substantial independent responsibility and given substantial delegated powers, but not itself a coordinate branch. A solution to the dispute was not within the legal control of the President. For although no statute expressly denies that a Federal Power Commissioner can be removed by the President without cause, it is

clear from the regulatory and adjudicative functions of the Commission that, as in *Weiner v. United States*, 357 U.S. 349, 356 (1958), "we are compelled to conclude that no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." Since, under the rationale of *Humphrey's Executor*, the President could not order the Commission to comply with the Executive Branch's view of the public interest, a suit by the government in its proprietary capacity was the necessary means of resolving the dispute, and was clearly allowable under *United States v. ICC*.

It may be, then, that the fact that the Executive's dispute was with an independent agency was regarded by some Justices as sufficient to confer standing. It may be that some Justices were persuaded by the presence of a private party claiming a property right that the Secretary wished to extinguish. In this respect, too, *Chapman* parallels *United States v. ICC*. We cannot know the rationales of the various Justices, but there is certainly no basis for using an unexplained case as the reason for creating a general rule of standing for all branches and members of branches to assert their legal rights directly against one another when it is clear that such a general rule is contrary to article III and Supreme Court precedent.

The majority claims that *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977), "indicat[es] that [an] incumbent President would 'be heard to assert' [a] claim that [a statute] unconstitutionally impinges upon the autonomy of the Executive Branch." Maj. op. at 8. The majority supposes that this means the President would have standing

to sue because his governmental powers had been invaded without any other injury. That is an astonishing inference to draw from a decision that has absolutely nothing to do with governmental standing and does not in any way suggest that the President could sue Congress or one of his own subordinates in the Executive Branch to defend his constitutional powers.

Former President Nixon's standing to challenge the constitutionality of the Presidential Recordings and Materials Preservation Act rested upon his allegation that the statute disposed of materials that were his personal property. 433 U.S. at 431, 435-36. He raised the constitutional prerogatives of the presidency not as a basis for standing but as grounds of substantive law that invalidated the Act. The situation was no different than when any private plaintiff who has standing because of a threat to his property advances a constitutional contention on the merits of the dispute.

The majority has apparently misinterpreted the Court's rejection of an argument that the former President could not rely upon rights pertaining to an incumbent President. This was a *jus tertii* argument—that, for prudential reasons, the federal courts should not allow a plaintiff to challenge the constitutionality of a statute on the grounds that it infringes the constitutional rights of others. See generally *Valley Forge*, 454 U.S. at 474; *Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976). Thus, the passage the majority cites from *Nixon v. Administrator* states only: "We reject the argument that only an incumbent President may assert such claims [of separation of powers and the presidential privilege of confidentiality] and hold that appellant, as a former President, may also be heard to assert them." 433 U.S. at 439. It is far-

etched enough to infer from this that the Court was saying an incumbent President could sue Congress directly, but the inference disappears without a trace when it is realized that this was a *jus tertii* discussion and that the Court was not even remotely concerned with an impingement on the autonomy of the Executive Branch as a basis for standing. *Nixon v. Administrator* lends the majority no support whatever.

The majority also makes the untenable claim that *INS v. Chadha* indicates that Congress has a judicially cognizable interest in vindicating its constitutional powers. In *Chadha*, the INS, the executive agency charged with enforcing the immigration laws, agreed with Chadha that the legislative veto authorized by section 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1254(c)(2) (1982), was unconstitutional. 103 S. Ct. at 2772. Agreeing that under these circumstances the court of appeals had rightly allowed both Houses of Congress to intervene, the Court said: "We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional. See *Cheng Fan Kwok v. INS*, [392 U.S. 206], 210 n.9 [(1968)]; *United States v. Lovett*, 328 U.S. 303 (1946)." 103 S. Ct. at 2778. There was, in *Chadha* as in the cases the Court cited, an aggrieved individual who sought relief that ran only against the Executive Branch: that satisfied the injury-in-fact, causation, and redressability requirements of article III. Indeed, the Court specifically held that "prior to Congress' intervention, there was adequate Art. III adverseness even though the only parties were the

INS and Chadha." *Id.* Although the INS agreed that the statute requiring it to deport Chadha was unconstitutional, but for the court of appeals' ruling to that effect, the INS would have deported Chadha. *Id.* Congress, though nominally a party, was in reality much more in the position of an *amicus curiae*. No judgment could be entered against Congress, whose position as an intervenor differed from status as an amicus only in the ability to petition for certiorari. Congress' intervention, in other words, merely heightened the "concrete adverseness" of what was already a case-or-controversy. It is a far cry from that carefully limited holding to saying that Congress suffers a judicially cognizable injury when its law-making powers are infringed. See maj. op. at 13-14.

The foregoing analysis demonstrates, I think, that the cases relied upon by the majority lend it no support and that some of them show its positions to be wrong. But if a construction seemingly favorable to the majority's doctrine of general governmental standing could somehow be tortured out of one of these or some other cases, those decisions would remain anomalies and exceptions that should not be used to construct general doctrine. If we begin to generalize from aberrations, taking as our model the abnormal, we will ultimately produce not a natural but a deformed thing, a doctrine that is not Jekyll but Hyde; and that is what is being built in this circuit, a constitutional monstrosity. Constitutional doctrine should continually be checked not just against words in prior opinions but against basic constitutional philosophy. When that is done it becomes plain, as I have already shown, that the doctrine of congressional, and hence of governmental, standing has no legitimate place in our jurisprudence.

E.

It is also not the case that binding precedent in this circuit requires us to hold that appellants have standing. The majority rests this conclusion on *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), and *Moore v. U.S. House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3483 (U.S. Jan. 7, 1985). See maj. op. at 8, 9 n.13. That, I think, will clearly not do. In *Kennedy*, this court held that a senator had standing to challenge the legality of an intrasession pocket veto because the veto nullified his vote on the bill to which it applied. In reaching that holding, the *Kennedy* court nowhere addressed the separation-of-powers considerations that pervade the standing inquiry as articulated and applied in subsequent Supreme Court cases, notably *Valley Forge* and *Allen v. Wright*. The *Kennedy* Court's discussion of article III standing turned exclusively on a party's fitness to litigate and did not depend on separation-of-powers considerations. 511 F.2d at 433. That view of standing had been endorsed by the Supreme Court a few years before *Kennedy* was decided. See *Flast v. Cohen*, 392 U.S. 83, 100-01 (1968). But *Flast's* view of standing has proved to be an aberration, for divorcing standing from separation-of-powers considerations inexorably leads to successive accretions to the power of the federal judiciary, a result the Framers certainly did not intend. *Valley Forge* and *Allen v. Wright* demonstrate that the Court, reversing the course it took in *Flast*, has restored separation-of-powers considerations as the central premise of the constitutional standing requirement. These recent Supreme Court decisions are flatly inconsistent with the method of analyzing the standing of congressional plaintiffs the

Kennedy court employed. At a minimum, therefore, we are bound to abandon *Kennedy's* rationale, and any reaffirmation of *Kennedy*, to be valid, must rest on a different standing analysis.

In view of the virtual identity, for purposes of standing analysis, between *Kennedy* and the litigation now before us, an effort to supply an alternative basis for *Kennedy's* result is essential if *Kennedy* is to continue to be regarded as binding precedent.¹⁸

¹⁸ Concurring in *Vander Jagt*, 699 F.2d at 1177, I suggested that we adhere to the "distinction between diminution of a legislator's influence and nullification of his vote," 699 F.2d at 1180, which the en banc court had adopted in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *judgment vacated on other grounds*, 444 U.S. 996 (1979). Under the *Goldwater* test, congressional plaintiffs have standing only if "the alleged diminution in congressional influence . . . amount[s] to a disenfranchisement, a complete nullification or withdrawal of a voting opportunity." 617 F.2d at 702. By contrast, the position adopted by the panel opinion in *Vander Jagt* treats any substantial diminution of a legislator's influence on the legislative process as a judicially cognizable grievance. *Vander Jagt*, 699 F.2d at 1168; see also *Riegle*, 656 F.2d at 880. Upon further reflection, it seems to me that not even the *Goldwater* "nullification" test is adequate to the standing inquiry. When the interest sought to be asserted is one of governmental power, there can be no congressional standing, however confined.

To begin with, it is impossible to find in the structure of the Constitution a limited doctrine of congressional standing. The history and structure of the Constitution rule out the possibility that the Framers intended article III jurisdiction to extend to intra-branch or inter-branch disputes over infringement of official powers. That being so, there is no room to argue—nor any suggestion in the text of the Constitution—that they intended to single out the nullification of a legislator's vote for special treatment. The ultimate question is whether the provisions in the Constitution that confer various

Indeed, because none of this court's congressional standing cases, including *Moore*, rests on the premise that separation-of-powers considerations must inform the article III standing inquiry, those cases cannot possibly be binding precedent.¹⁹

governmental powers on the coordinate branches and reserve powers to the states were meant to serve as a direct and independent basis for judicial review. As I have shown in Part IV of this opinion, that is unquestionably not what the Framers intended. As I have shown in Part I, if their intentions are to be overridden in the name of vindicating constitutional grants of governmental power, they must be overridden wherever the Constitution or other law makes such a grant. The results of that rationale, as I have shown in Parts II and III, are incompatible with binding Supreme Court precedent on the subject of standing. The conclusion must be that even the *Goldwater* test allows us a jurisdiction and a power that article II forbids.

¹⁹ The panels in *Riegle* and *Vander Jagt* explicitly refused to consider separation-of-powers implications in connection with the standing inquiry. See *Riegle*, 656 F.2d at 880; *Vander Jagt*, 699 F.2d at 1170 & n.5. In *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), the court did suggest that separation-of-powers issues should play some role in its standing inquiry, *id.* at 215, but it also stated that "we do not rest our denial of standing on these separation of powers grounds." *Id.* The opinion for the *en banc* court in *Goldwater*, 617 F.2d 697, at most assigned only this supportive, nondispositive, weight to separation-of-powers considerations. In *Moore*, the panel opinion acknowledged that *Valley Forge* "reinforces the principle that where separation-of-powers concerns are present, the plaintiff's alleged injury must be specific and cognizable in order to give rise to standing." 733 F.2d at 951 (footnote omitted). But there was no discussion whatsoever of whether impairment of a legislator's official powers could be treated as judicially cognizable injury without violating that "principle." The panel contended itself with the bare assertion that "[t]he injury alleged by appellants here is to an interest positively identified by the Constitution." *Id.*

Although the majority views *Kennedy* and *Moore* as binding precedent, it offers no real defense of the standing analysis employed in those cases, or of the equitable discretion doctrine itself. Instead, the majority suggests that it need not consider the doctrine of equitable discretion here because that doctrine applies only to "actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process." Maj. op. at 12-13.

Thus the court now holds, for the first time, that Congress, or either of its Houses, has standing to sue the President for allegedly infringing its lawmaking powers, and that even the limited prudential role that the equitable discretion doctrine assigns to separation-of-powers considerations is inapplicable in such cases. That is tantamount to adopting a *per se* rule that Congress has standing to sue the President whenever it plausibly alleges an actual impairment of its lawmaking powers. But if Congress may sue under these circumstances, it should follow that a congressional plaintiff may sue whenever he plausibly alleges an actual impairment of his lawmaking powers. The harm, in each case, is of the same kind—an injury to lawmaking powers. *Kennedy* stated in dictum that the injury suffered by Congress was "direct," while the injury suffered by an individual member of Congress was "derivative" and "indirect." 511 F.2d at 435, 436. But that distinction has consistently been treated as immaterial in this court's congressional standing cases, and the majority does not purport to rely on it now. That is quite understandable, for once impairment of governmental powers is deemed sufficient to confer standing it is ob-

vious that an individual member of Congress suffers immediately rather than remotely, as those concepts are employed in the causation branch of the article III standing inquiry. Moreover, the harm to an individual legislator is much greater, for his ability to engage in political struggle with the President is far less than the ability of an entire House or of the entire Congress. The majority, if it applied the rationale for its *per se* rule consistently, would therefore abandon the equitable discretion doctrine altogether.

Instead, the majority confines that doctrine to cases in which the court believes that congressional plaintiffs are not attempting to "overturn[] the results of the legislative process." Maj. op. at 13. The legislative process, of course, is implicitly and quite arbitrarily defined as a process that ends when "Congress has passed an Act." Maj. op. at 13. That was far from obvious to the Framers, who debated at some length whether the veto improperly gave the Executive a share in legislative power. See, e.g., 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 73-80 (1st ed. 1911). Thus, The Federalist had to defend the President's qualified veto power against the charge that it violated the principle of separation of powers. That defense took the form, not of denial that the veto power was a legislative power, but of an argument that separation of powers was not an absolutist principle, but one which was "entirely compatible with a partial intermixture of those departments for special purposes, preserving them, in the main, distinct and unconnected." *The Federalist* No. 66, at 445, 446 (A. Hamilton) (J. Cooke ed. 1961) (applying this reasoning to the Senate's power to try impeachments

and to the President's veto power). See also 2 M. Farrand, *supra*, at 75 (remarks of Gerry) (arguing against the Council of Revision on the grounds that "[i]t was making the Expositors of the Laws [the Judiciary], the Legislators which ought never to be done"); *id.* (remarks of Gouverneur Morris) (responding to Gerry with the observation that "the Judges in England had a great share in ye Legislation"). Would the majority contend that the Vice-President's tie-breaking vote is not part of the legislative process? Of course, if the alternative definition of the legislative process as including the veto (and, on the same reasoning, the pocket veto) were accepted, it would follow, on the majority's own reasoning, that neither Congress nor the congressional plaintiffs have standing to bring this action, for they would, on that definition, be attempting to overturn the results of the legislative process.

Apart from that, the majority offers no explanation of why a legislator who has "failed to persuade [his] fellow legislators" to enact a bill should be treated differently from a legislator who has failed to persuade them to reenact the bill to which the "pocket veto" had been applied. If "the principle that a legislator must lack collegial or 'in-house' remedies before this court will confer standing," *Riegle*, 656 F.2d at 879, is, as the majority appears to think, the sole basis for the equitable discretion doctrine, and if that principle is applied consistently, then the equitable discretion doctrine must be applied to the congressional plaintiffs in the suit before us today. That being true, the doctrine of equitable discretion should have barred the suit by Senator Kennedy in *Kennedy v. Sampson*: as the *Riegle* court pointed out, he "had collegial remedies . . . ;

Senator Kennedy's power to reintroduce the relevant legislation in the next session of Congress and to vote thereon remained unimpaired." 656 F.2d at 880. The principle, moreover, would seem to apply even more strongly to Congress itself—for Congress surely is in a better position to reenact the vetoed bill than is any congressional plaintiff. One can therefore as easily derive from the majority's arguments the proposition that neither Congress nor the congressional plaintiffs are properly before us as the proposition that each is properly before us. That is a fitting commentary on the coherence of this court's governmental standing doctrine.

The majority's position is also inconsistent with the treatment of the equitable discretion doctrine in *Riegle*, which first invoked that doctrine. In *Riegle*, a panel of this court said that "[w]hen a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available or a private plaintiff would likely not qualify for standing, the court would be counseled under our [equitable discretion] standard to hear the case." 656 F.2d at 882.²⁰ Thus, the *Riegle* court justified the result in

²⁰ *Riegle* explained the need to invoke the equitable discretion doctrine in cases where legislative redress is available on the grounds that in disputes between a member of Congress and "his fellow legislators," "separation-of-powers concerns are most acute." The reason *Riegle* proposes for this claim is that in such cases "[j]udges are presented not with a chance to mediate between the two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decision-making." *Id.* That distinction is factitious. The "processes of democratic decisionmaking" are circumvented and the will of one of the political branches thwarted when this court adjudicates the lawmaking powers of Congress vis-a-vis the Presi-

Kennedy v. Sampson (which it had already explained as a case in which legislative redress *was* available) on the grounds that in that case a private party would not have had standing to challenge the pocket veto. *See id.* In this suit, as in *Kennedy*, we have before us legislators who could obtain legislative redress. If the majority were applying *Riegle*, it would therefore dismiss the action by the individual appellants in their capacity as legislators, unless it determined that a similar action could not be brought by a private plaintiff. Since the legislators here are also suing in their individual capacities, there would seem no excuse for not making that determination. If the majority believes that *Riegle* is no longer good law, it should say so, in order that our district courts may at least know what the law in this circuit is—however uncomfortable it may be to apply.²¹

dent no less than when it adjudicates the lawmaking powers of a congressional plaintiff vis-a-vis Congress. In either situation, what is objectionable—for purposes of the standing issue—is not the question being adjudicated but the fact that the plaintiff is allowed to sue on the basis of an alleged impairment of its or his lawmaking powers.

²¹ In *Melcher v. Federal Open Market Committee*, C.A. No. 84-1335, now pending in the district court, a United States Senator has brought an action the district court has characterized as identical to Senator Riegle's suit in *Riegle*. Mem. order at 1 (Sept. 28, 1984). Relying on *Riegle*, the district court in *Melcher* has stayed that action pending this court's decision in *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, C.A. No. 83-1930, which will determine whether another district court correctly held that "a group of over 800 plaintiffs seeking the same relief that Senator Belcher seeks" lacked standing. Mem. order at 2. As the district court in *Melcher* explained, if this court holds that the private plaintiffs have standing, then Senator Melcher's action should be dismissed under *Riegle*. If, on the

It is clear, then, that neither Supreme Court precedent nor binding precedent in this circuit supports what the majority does today.

VI.

It is rather late in our history for courts to rearrange fundamental constitutional structures. But, even if one hypothesizes that to be proper in some small class of cases, and I do not, nonetheless, shifts in the constitutional relationships of the three branches of government should be examined carefully to determine whether they are legitimate. That, of course, depends on whether these shifts represent the working out of implications already inherent in real constitutional principles or whether they are mere innovations, reflecting perhaps no more than the tendency of the judiciary, not least of this court, to expand its authority in a mood of omniscience. It seems plain that the creation of congressional (and hence of general governmental) standing falls into the latter category.

The legitimacy, and thus the priceless safeguards of the American tradition of judicial review may decline precipitously if such innovations are allowed to take hold.

[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distin-

other hand, this court holds that the private plaintiffs lack standing, "then in light of *Riegle* and subsequent cases, a decision may have to be made whether the instant case should be decided on the merits or dismissed for separation of powers reasons." Mem. order at 2-3 (footnote omitted).

guish themselves from all taxpayers or all citizens. The irreplaceable value of the power articulated by Mr. Chief Justice Marshall lies in the protection it has afforded the constitutional rights and liberties of individual citizens and minority groups against oppressive or discriminatory government action. It is this role, not some amorphous general supervision of the operations of government, that has maintained public esteem for the federal courts and has permitted the peaceful coexistence of the counter-majoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests.

United States v. Richardson, 418 U.S. 166, 192 (1974) (Powell, J., concurring). Yet when federal courts approach the brink of "general supervision of the operations of government," as they do here, the eventual outcome may be even more calamitous than the loss of judicial protection of our liberties. Gradually inured to a judiciary that spreads its powers to ever more aspects of governance, the people and their representatives may come to accept courts that usurp powers not given by the Constitution, courts that substitute their discretion for that of the people's representatives. Perhaps this outcome is also the more likely of the two because excesses such as this court's governmental standing rationale, shrouded as they are in technical doctrine, are not so visible as to excite alarm. This case represents a drastic rearrangement of constitutional structures, one that results in an enormous and uncontrollable expansion of judicial power. I have tried to make that fact visible. There is not one shred of support for what the majority has done, not in the Constitution, in case law, in

logic, or in any proper conception of the relationship of courts to democracy. I have tried to make that fact visible, too.

I dissent.

APPENDIX B

UNITED STATES DISTRICT COURT DISTRICT OF COLUMBIA

Civ. A. No. 84-0020

MICHAEL D. BARNES, ET AL., PLAINTIFFS

v.

GERALD P. CARMEN, RONALD GEISLER, DEFENDANTS

March 9, 1984

MEMORANDUM AND ORDER

JACKSON, District Judge.

The original plaintiffs are 33 members of the United States House of Representatives, suing individually and as members of the House, of whom 31 voted in favor of a bill known as H.R. 4042 and two did not vote. They are joined by plaintiff-intervenors the United States Senate and the Speaker and bipartisan elected leadership of the House of Representatives.¹ Defendant Geisler is the Executive Clerk of the White House, and defendant Carmen is the Ad-

¹ The intervenors from the House are Thomas P. O'Neill, Jr., Speaker of the House, Jim Wright, Majority Leader, Robert H. Michel, Minority Leader, Thomas S. Foley, Majority Whip, and Trent Lott, Minority Whip. Both interventions were unopposed.

ministrator of the General Services Administration. Plaintiffs allege, and defendants acknowledge, that defendant Geisler has a duty to deliver acts of Congress that have become law to the General Services Administration for publication, and defendant Carmen has a duty, under 1 U.S.C. §§ 106a, 112, and 113 (1982), to publish them.

Plaintiffs seek a declaratory judgment that H.R. 4042, 98th Cong., 1st Sess. (1983), passed by both houses of Congress, but neither signed by the President nor returned by him to the House of Representatives within 10 days (Sundays excepted) after its presentment to him, became a validly enacted law of the United States in accordance with article I, section 7, clause 2 of the Constitution, and they pray that a writ of mandamus or preliminary and permanent injunction issue directing defendants to cause it to be published as a public law.² The Court ordered the trial of the action on the merits advanced and consolidated with the hearing on the application for the preliminary injunction pursuant to Fed. R. Civ. P. 65(a)(2), and the parties have since filed cross-motions for summary judgment. The underlying material facts are not in dispute.

1.

On September 30, 1983, the House of Representatives passed H.R. 4042.³ The Senate passed it with-

² An action seeking a mandatory injunction directing a government official to perform a ministerial, non-discretionary duty is treated as one for mandamus. *National Wildlife Federation v. United States*, 626 F.2d 917, 918 n. 1 (D.C. Cir. 1980); *National Ass'n of Rehabilitation Facilities v. Schweiker*, 550 F. Supp. 357, 362-63 (D.D.C. 1982).

³ H.R. 4042 would continue in effect the provisions of the International Security and Development Cooperation Act of

out amendment on Thursday, November 17, 1983. The following day the Speaker of the House and the President Pro Tempore of the Senate signed the bill, and the House Committee on Administration presented it to President Reagan for his consideration. On the same day, November 18th, the 98th Congress adjourned its first session *sine die*,⁴ after agreeing by joint resolution to convene its second session on January 23, 1984, which it did. Prior to adjournment the Senate authorized the Secretary of the Senate to receive messages from the President in its absence; a standing House of Representatives rule confers similar authority on its Clerk.⁵ The President neither signed H.R. 4042 into law nor returned it to the House with a veto message. On Wednesday, November 30th, the tenth day after its presentment to him (excluding Sundays) he issued a statement that he was withholding his approval of the bill.⁶ Defendants accordingly did not deliver and publish it as law.

1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555-57 (1981), 22 U.S.C. § 2370 note (1982), to require the President to make certain periodic certifications to Congress with respect to the conduct of the government of El Salvador as a condition of its continued receipt of United States military assistance.

⁴ The adjournment was conditional, authorizing the Speaker of the House of Representatives and the Majority Leader of the Senate to reassemble the Congress "whenever, in their opinion the public interest shall warrant it." H. Con. Res. 221, 98th Cong., 1st Sess., 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983).

⁵ 129 Cong. Rec. S17192-93 (daily ed. Part IV, Nov. 18, 1983); Rules of the House of Representatives, 98th Cong., 1st Sess., Rule III, clause 5, 129 Cong. Rec. H22 (daily ed. Jan. 3, 1983).

⁶ Statement of Principal Deputy Press Secretary Speakes, Nov. 30, 1983; 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30, 1983).

II.

Article I, section 7, clause 2 of the Constitution, the first of the Presentment Clauses, defines the respective powers of the Congress and the President in the enactment of legislation. It provides:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Thus, after both houses of Congress pass a bill and present it to the President, it has one of four possible destinies: the President may sign it into law within ten days; the President may return it with a veto message to the house in which it originated within ten days for reconsideration by both houses; the President may hold the bill for more than ten days without signing or returning it, although he might have returned it, in which case it becomes a law without

more; or the President may hold it for more than ten days without signing or returning it, but Congress by its adjournment in the meantime has "prevented" its return, and the bill thus expires by the process which has come to be known as the "pocket veto."

The question presented by this case is, therefore, whether through the third of these eventualities H.R. 4042 became a law, or through the fourth it did not, and the answer to the question depends on whether the adjournment of the first session of the 98th Congress on November 18, 1983, until the commencement of its second session approximately nine weeks later may be said to have prevented the President's returning H.R. 4042 to the House of Representatives with his objections whence Congress might have proceeded with an attempt to override the veto.

Plaintiffs contend that, notwithstanding historical and judicial precedent of the more distant past to the contrary, contemporary conditions as well as more recent authority have made a pocket veto during an intersession adjournment of Congress an anachronism. It is, they say, incompatible with the perceived scheme of the Presentment Clause, *viz.*, that the President and Congress, respectively, have suitable opportunity to consider and object to bills, and to consider objections and override them if it can. They claim it is now a discredited practice, abandoned by the two most recent predecessors of the incumbent President. As a practical matter, plaintiffs assert (and defendants agree), intersession adjournments of Congress are indistinguishable from intrasession adjournments, even as to their accustomed length.⁷ Pending business—

⁷ Congress, and each house thereof, often take breaks within each session, referred to as "intrasession" adjournments, which are not *sine die*, since the adjournment resolution will specify

except for Senatorial confirmations—remains pending, and the organizations of both houses remain intact. The appointment of agents by both houses to receive and record Presidential messages in the members' absences,⁸ and modern means of communication and transportation to enable them to reassemble with dispatch, have eliminated any uncertainty as to a bill's status upon its return with objections to an empty chamber, or any delay in resolving it (if, indeed, there ever were), and have rendered the pocket veto obsolete during all but final adjournments at the end of a Congressional term when Congress, as such, no longer exists.

Defendants argue from original scholarship that the intent of the Framers of the Constitution can be discerned from their rejection of draft language, drawn from a state constitution, which would have precluded a pocket veto altogether and required any veto to be made by return when the legislature was next in session. They point to historical practice demonstrating that virtually every American President since James Madison first did so in 1812 has

the date Congress (or a house) is to return. Such adjournments vary in length from the break at the end of each day, or over a weekend, to longer breaks for holidays, trips back to home districts or states, or campaigns and elections. Most recently intrasession adjournments have tended to be longer than those between sessions, although it was not so a decade ago. One house may, however, not adjourn for more than three days without the consent of the other. U.S. Const., art. I, § 5, cl. 4.

⁸ Because H.R. 4042 originated in the House, only its arrangements to receive messages are directly relevant to this case. But the Senate had also authorized receipt of messages during its intersession adjournment by an officer, the Secretary of the Senate. See *supra* note 5.

made intersession pocket vetoes, and that Congress has acquiesced in them—272 in all—which, they say, is compelling evidence of how most Presidents and Congresses have thought the Presentment Clause is to operate. And they assert that the pocket veto serves the important and practical function of promptly resolving the status of bills in Presidential disfavor so that the nation may know the law and the people order their affairs accordingly.

It is, however, not open to this Court to resolve the issue as an original matter, for there are three past decisions—two by the Supreme Court over a generation ago, and a more recent one by the Court of Appeals for the District of Columbia Circuit—which have considered the proper construction to be given the Presentment Clause.⁹ Plaintiffs rely on the reasoning of the second of the Supreme Court decisions and that of the court of appeals, while defendants contend that the first Supreme Court case still controls, the other two cases being distinguishable, and the court of appeals case, in any event, wrongly decided.

III.

In *The Pocket Veto Case*, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894 (1929) the Supreme Court affirmed the Court of Claims' dismissal of an Indian claims

⁹ A fourth case before another judge of this district court resulted in the entry of a consent judgment granting the relief prayed by these plaintiffs. *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). The opinion accompanying the order did not purport to decide the issues now presented, however, and could not, even if it had, serve as authority for the entry of a similar judgment against the non-consenting defendants here. See *United States v. Mendoza*, — U.S. —, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984).

case on the ground that the legislation on which its jurisdiction depended had not become law. The first session of the 69th Congress had passed the bill, which had originated in the Senate, and presented it to President Coolidge on June 24, 1926. On July 3rd, both houses adjourned the first session, in effect, until the beginning of the second session on the first Monday in December and, consequently, were not in session on July 6th, the tenth day (Sundays excepted) after the bill had been presented to the President who neither signed nor returned it to the Senate. Justice Sanford stated the issue for a unanimous court as follows:

This case presents the question whether, under the second clause in Section 7 of Article I of the Constitution of the United States, a bill which is passed by both Houses of Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it.

279 U.S. at 672, 49 S.Ct. at 463-64. The Supreme Court answered the question in the negative, and, since it is identical to the question presented by the instant case, so must this Court.

The Supreme Court expressly rejected contentions that the ten days given the President to consider a bill and formulate his objections be construed as "legislative" days, i.e., days when Congress was in session, rather than calendar days, and that only final adjournments operate to prevent a veto by return. 279 U.S. at 679-80, 49 S.Ct. at 466-67. Then, as to

the suggestion that Congress could appoint agents to receive the President's veto during an adjournment although neither house had done so, the Supreme Court said:

Aside from the fact that Congress has never enacted any statute authorizing any officer or agent of either House to receive for its bills returned by the President during its adjournment, and that there is no rule to that effect in either House, the delivery of a bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate.

Id. at 684, 49 S.Ct. at 468. "In short," it said,

... it was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving the public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration

Id. at 684-85, 49 S.Ct. at 468.

Plaintiffs contend that the two subsequent decisions have so attenuated *Pocket Veto* as to deprive it of controlling force here.

In *Wright v. United States*, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439 (1938), which plaintiffs say overruled *Pocket Veto sub silentio*, the Supreme Court once again affirmed the Court of Claims in its dismissal of a case for want of jurisdiction which would have been conferred upon it by a Senate bill passed by both houses but vetoed by President Roosevelt who returned the bill unsigned with his objections to the Secretary of the Senate while the Senate alone was in

a three-day recess. The Supreme Court held that the adjournment of a single house did not constitute the adjournment of "the Congress," i.e., both houses, contemplated by article I, section 7, as "preventing" a return veto, and it repudiated the dictum of *Pocket Veto* anticipating its disapproval of the use of agents to accept veto messages should either house attempt to appoint one. There is, to be sure, language in the opinion suggesting that, given the relationship between the President and Congress for the enactment of legislation the court discerned as intended by the Presentment Clause, neither the length of an adjournment nor whether either or both houses happened to be out of session when the President's ten days had elapsed would necessarily be determinative of whether a return veto had been prevented. See 302 U.S., 596-97, 58 S.Ct. at 400-01. But, speaking of the *Pocket Veto* dictum, the court also took the occasion to recall Chief Justice Marshall's admonition that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," 302 U.S. at 593, 58 S.Ct. at 399, and although the *Wright* court was speaking of *Pocket Veto*'s anticipatory disapproval of the use of agents, the admonition is no less pertinent to its own opinion in *Wright*. The Court stated precisely what it intended to rule:

We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days and the Congress

does not pass the bill over his objections by the requisite votes. In this instance the bill was properly returned by the President, it was open to reconsideration in Congress, and it did not become a law.

It expressly declined to predict how it might dispose of a case in which both houses consent to adjournment and a long period of adjournment ensues. "We have no such case before us," it said, "and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect." 302 U.S. at 598, 58 S.Ct. at 40.¹⁰

Thirty-six years later, the Court of Appeals for the District of Columbia Circuit decided *Kennedy v. Sampson*, 511 F.2d 430 (D.C.Cir.1974) in which a United States Senator brought suit against the instant defendants' predecessors to obtain the relief sought against defendants here with respect to a bill known as S. 3148, passed by the 91st Congress in its second session and presented to the President on December 14, 1970, eight days before both houses adjourned for a five-day intrasession Christmas recess, the Senate having authorized its Secretary to receive messages from the President during the adjournment. President Nixon did not, however, attempt to return the bill to the Senate with his objections but declared publicly that he would (as he ultimately did) with-

¹⁰ Justices Stone and Brandeis concurred in the judgment that the bill had not become law, but because the Senate had, by its adjournment, "prevented" its return and, thus, effected a pocket veto. They presciently foretold that the majority opinion would "leave in confusion and doubt the meaning and effect of the veto provisions of the Constitution, the certainty of whose application is of supreme importance." 302 U.S. at 599, 58 S.Ct. at 402.

hold his signature. The district court granted judgment for plaintiff, ordering the bill published as a validly enacted law, and the court of appeals affirmed. Having first found the plaintiff to have standing to raise the issue (upon grounds which control this Court as to any similar question here), the court continued to apply the rationale of *Wright* to the circumstances presented, holding that "the Christmas recess [of Congress] of 1970 did not prevent the return of S. 3148." 511 F.2d at 442. It reached its conclusion, it said, by either of two routes: "the logic, if not the precise holding," of *Wright*, and its own determination that no *intrasession* adjournment, "as that practice is presently understood," could prevent the return of a bill by the President where appropriate arrangements have been made for receipt of presidential messages during the adjournment. *Id.*

Not only did the *Kennedy v. Sampson* court expressly limit its own holding to an *intrasession* adjournment (which had been, in fact, of only five days' duration), its reasoning depended in large measure upon its understanding of the then-current practice of "much shorter" *intrasession* than *intersession* adjournments which had "virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*." *Id.* at 441. And it accompanied its opinion with an appendix demonstrating that Congress' *intrasession* adjournments had historically tended to be relatively brief and only somewhat recently had come to be regarded as affording Presidents opportunity for a pocket veto.

This Court concludes that neither *Wright* nor *Kennedy v. Sampson* give it license to depart from the only case directly in point, *Pocket Veto*. Unless and until the Supreme Court reconsiders the rule of that

case, this Court must, as must all lower federal courts, follow it. *Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 1314, 103 S.Ct. 842, 843, 74 L.Ed.2d 924 (Powell, J., Circuit Justice 1983), *on subsequent appeal sub nom. Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983); *Hutto v. Davis*, 454 U.S. 370, 375, 102 S.Ct. 703, 706, 70 L.Ed.2d 556 (1982); *United States v. Caldwell*, 543 F.2d 1333, 1370 (D.C.Cir.1974), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *Breakefield v. District of Columbia*, 442 F.2d 1227, 1229-30 (D.C.Cir.1970), *cert. denied*, 401 U.S. 909, 91 S.Ct. 871, 27 L.Ed.2d 807 (1971); *Quilici v. Village of Morton Grove*, 532 F.Supp. 1169, 1181 (N.D. Ill.1981), *aff'd* 695 F.2d 261 (7th Cir.1982), *cert. denied*, — U.S. —, 104 S.Ct. 194, 78 L.Ed.2d 170 (1983).

The Supreme Court has recently considered the Presentment Clauses of article I, section 7 of the Constitution in another context to declare unconstitutional a Congressional practice of some years' standing it found to be at variance with them. Describing the scheme embodied in the Constitution for the sharing of the legislative power as "a single, finely wrought and exhaustively considered procedure," it stated that the fact that the practice might be "efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *INS v. Chadha*, — U.S. —, 103 S.Ct. 2764, 2780-81, 2784, 77 L.Ed.2d 317 (1983). If similar utilitarian considerations are, in this case, to result in the demise of the *intersession* pocket veto, the Supreme Court will have to say that *Pocket Veto* is no longer

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declarative of a procedure a President may constitutionally employ.

For the foregoing reasons, therefore, it is, this 9th day of March, 1984,

ORDERED, that motions of plaintiffs and plaintiff-intervenors for summary judgment, and for preliminary and permanent injunctive relief are denied; and it is

FURTHER ORDERED, that the motion of defendants for summary judgment is granted, and the complaint is dismissed with prejudice.

133a

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL.

v.

RAY KLINE, individually and
in his capacity as Administrator,
General Services Administration, ET AL.

[Filed Aug. 7, 1985]

Before: Robinson, Chief Judge; Bork, Circuit Judge
and McGowan, Senior Circuit Judge

ORDER

Upon consideration of the petition for rehearing
of appellees Ray Kline, et al., it is

134a

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Bork would grant the petition for rehearing.

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL.

v.

RAY KLINE, individually and
in his capacity as Administrator,
General Services Administration, ET AL.

[Filed Aug. 7, 1985]

Before: Robinson, Chief Judge; Wright, Tamm,
Wald, Mikva, Edwards, Ginsburg, Bork,
Scalia and Starr, Circuit Judges

ORDER

The suggestion for rehearing *en banc* of appellees Ray Kline, et al., has been circulated to the full Court. A majority of the judges in regular active

service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judges Bork, Scalia and Starr would grant the suggestion for rehearing *en banc*.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL., APPELLANTS

v.

RAY KLINE, individually and
in his capacity as Administrator,
General Services Administration, ET AL.

[Filed Aug. 29, 1984]

Before: ROBINSON, Chief Judge, BORK, Circuit
Judge, and MCGOWAN, Senior Circuit
Judge.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was briefed and argued

by counsel. It appearing that no material facts are in dispute, and upon consideration of the opinion of the District Court and the arguments of counsel it further appearing that appellants and appellant-intervenors are entitled to summary judgment as a matter of law, it is

ORDERED and ADJUDGED that the judgment of the District Court granting summary judgment to appellees is hereby reversed and the case remanded to the District Court with the instruction that summary judgment be entered for appellants and appellant-intervenors. It is

FURTHER ORDERED that the mandate herein shall issue forthwith.

Opinion of the court to follow. Bork, J., dissents on the ground that neither appellants nor appellant-intervenors have standing to bring this action.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

CA No. 84-00020

No. 84-5155

MICHAEL D. BARNES, individually/member;
U.S. House of Representatives, ET AL., and
UNITED STATES SENATE, ET AL.

v.

RAY KLINE, individually and
in his capacity as Administrator,
General Services Administration, ET AL.

[Filed Jun. 4, 1985]

Before: Robinson, Chief Judge, Bork, Circuit Judge,
and McGowan, Senior Circuit Judge

ORDER

Appellants in this action are hereby directed to file with the Court within two weeks from the date of this order briefs in response to appellee-petitioners' suggestion, in the Supplemental Petition for Rehear-

ing with Suggestion for Rehearing *En Banc* filed by appellees on May 17, 1985, that this case is now moot and the judgment and opinion should accordingly be vacated. Appellants are specifically instructed to inform the Court whether the requirements of H.R. 4042 were fully complied with during the effective period of the bill. If not, appellants shall inform the Court whether such lack of compliance requires any further action on the part of any Executive or Legislative official that has not yet been performed, including, but not limited to, action taken in connection with any funds or credits that may have been supplied to or approved for the government of El Salvador during fiscal year 1984. Appellants are also directed to address the question of whether appellee Ray Kline has published H.R. 4042 as a law, and if not, whether such failure constitutes a continuing impairment of the lawmaking powers of the appellants. Appellee-petitioners may file a supplemental brief with the Court within two weeks of the date of issuance of this order, addressing the issues specified in this order.

The parties are directed to submit 25 copies of each brief filed.

Per Curiam

FOR THE COURT
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX G

H.R. 4042, 98th Cong., 1st Sess. (1983), provided:

That the requirements of section 728 of the International Security and Development Cooperation Act of 1981 (including the last sentence of subsection (e) of that section) shall continue to apply after the end of the fiscal year 1983 until such time as the Congress enacts new legislation providing conditions for United States military assistance to El Salvador or until September 30, 1984, whichever occurs first.

Section 728 of Pub. L. No. 97-113, 95 Stat. 1555-1557, as amended by the Joint Resolution of Aug. 10, 1982, Pub. L. No. 97-233, 96 Stat. 260, and by Pub. L. No. 98-53, 97 Stat. 287, provided:

(a) (1) The Congress finds that peaceful and democratic development in Central America is in the interest of the United States and of the community of American States generally, that the recent civil strife in El Salvador has caused great human suffering and disruption to the economy of that country, and that substantial assistance to El Salvador is necessary to help alleviate that suffering and to promote economic recovery within a peaceful and democratic process. Moreover, the Congress recognizes that the efforts of the Government of El Salvador to achieve these goals are affected by the activities of forces beyond its control.

(2) Taking note of the substantial progress made by the Government of El Salvador in land and banking reforms, the Congress declares it should be the policy of the United States to en-

courage and support the Government of El Salvador in the implementation of these reforms.

(3) The United States also welcomes the continuing efforts of President Duarte and his supporters in the Government of El Salvador to establish greater control over the activities of members of the armed forces and government security forces. The Congress finds that it is in the interest of the United States to cooperate with the Duarte government in putting an end to violence in El Salvador by extremist elements among both the insurgents and the security forces, and in establishing a unified command and control of all government forces.

(4) The United States supports the holding of free, fair, and open elections in El Salvador at the earliest date. The Congress notes the progress being made by the Duarte government in this area, as evidenced by the appointment of an electoral commission.

(b) In fiscal year 1982 and 1983, funds may be obligated for assistance for El Salvador under chapter 2 or 5 of part II of the Foreign Assistance Act of 1961 [22 U.S.C. 2311 et seq., 2347 et seq.], letters of offer may be issued and credits and guarantees may be extended for El Salvador under the Arms Export Control Act [22 U.S.C. 2751 et seq.], and members of the Armed Forces may be assigned or detailed to El Salvador to carry out functions under the Foreign Assistance Act of 1961 [this chapter] or the Arms Export Control Act, only if not later than thirty days after the date of enactment of this Act [Dec. 29, 1981] and every one hundred and eighty days thereafter, the President makes a certification in accordance with subsection (d).

(c) If the President does not make such such [sic] a certification at any of the specified times then the President shall immediately—

(1) suspend all expenditures of funds and other deliveries of assistance for El Salvador which were obligated under chapters 2 and 5 of part II of the Foreign Assistance Act of 1961 [22 U.S.C. 2311 et seq., 2347 et seq.] after the date of enactment of this Act [Dec. 29, 1981];

(2) withhold all approvals for use of credits and guarantees for El Salvador which were extended under the Arms Export Control Act [22 U.S.C. 2751 et seq.] after the date of enactment of this Act [Dec. 29, 1981];

(3) suspend all deliveries of defense articles, defense services, and design and construction services to El Salvador which were sold under the Arms Export Control Act [22 U.S.C. 2751 et seq.] after the date of enactment of this Act [Dec. 29, 1981]; and

(4) order the prompt withdrawal from El Salvador of all members of the Armed Forces performing defense services, conducting international military education and training activities, or performing management functions under section 515 of the Foreign Assistance Act of 1961 [22 U.S.C. 2321i].

Any suspension of assistance pursuant to paragraphs (1) through (4) of this subsection shall remain in effect during fiscal year 1982 and during fiscal year 1983 until such time as the President makes a certification in accordance with subsection (d).

(d) The certification required by subsection (b) is a certification by the President to the Speaker of the House of Representatives and to the chairman of the Committee on Foreign Relations of the Senate of a determination that the Government of El Salvador—

(1) is making a concerted and significant effort to comply with internationally recognized human rights;

(2) is achieving substantial control over all elements of its own armed forces, as as [sic] to bring to an end the indiscriminate torture and murder of Salvadoran citizens by these forces;

(3) is making continued progress in implementing essential economic and political reforms, including the land reform program;

(4) is committed to the holding of free elections at an early date and to that end has demonstrated its good faith efforts to begin discussions with all major political factions in El Salvador which have declared their willingness to find and implement an equitable political solution to the conflict, with such solution to involve a commitment to—

(A) a renouncement of further military or paramilitary activity; and

(B) the electoral process with internationally recognized observers.

Each such certification shall discuss fully and completely the justification for making each of the determinations required by paragraphs (1) through (4).

(e) On making the first certification under subsection (b) of this section, the President shall also certify to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that he has determined that the Government of El Salvador has made good faith efforts both to investigate the murders of the six United States citizens in El Salvador in December 1980 and January 1981 and to bring to justice those responsible for those murders. The second certification required under this section may be made only if it includes a determination by the President that the Government of El Salvador (1) has made good faith efforts since the first such certification was made to investigate the murders of those six United States citizens and to bring to justice those responsible for those murders, and (2) has taken all reasonable steps to investigate the disappearance of journalist John Sullivan in El Salvador in January 1981. The fourth certification required under this section may be made only if it includes a determination by the President that, since the third such certification was made, the Government of El Salvador (1) has made good faith efforts both to investigate the murders of the seven United States citizens in El Salvador in December 1980 and January 1981 and to bring to justice all those responsible for those murders, and (2) has taken all reasonable steps to investigate the killing of Michael Kline in El Salvador in October 1982.

3

Supreme Court, U.S.

FILED

JAN 8 1986

JOSEPH F. SPANIOL, JR.
CLERK

No. 85-781

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND

RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE,
PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP
OF THE U.S. HOUSE OF REPRESENTATIVES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
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v.

MICHAEL D. BARNES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**BRIEF FOR THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP
OF THE U.S HOUSE OF REPRESENTATIVES IN OPPOSITION**

Respondents, the Speaker and Bipartisan Leadership Group of the House of Representatives ("House parties")¹, submit this opposition to the petition for certiora-

¹ The House parties are the Honorable Thomas P. O'Neill, Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives—the Honorable Jim Wright, Majority Leader; the Honorable Robert H. Michel, Minority Leader; the Honorable Thomas S. Foley, Majority Whip; and the Honorable Trent Lott,

Continued

ri. None of the three questions raised by the Executive Branch petitioners—the bounds of the pocket veto, standing, or mootness—merits review by this Court. Regarding the bounds of the pocket veto, the Pocket Veto Clause serves a serious purpose: to assure that the President is guaranteed ten days to decide between signing or vetoing a bill will not be “destroyed” or “cut down,”² so that the President will not be “truly deprived,” App. 29a (opinion of the Court of Appeals), of that guaranteed time. Supreme Court review of the issue should await an effort by Congress to deprive the President of that guaranteed time, which this case most certainly is not.³

Similarly, regarding standing, this Court may find Congressional standing worthy of review in an appropriate case, but this is not such a case. No party briefed or argued the issue of Congressional standing in either of the lower courts. In fact, at oral argument in the court of appeals, the Executive Branch petitioners supported standing here, agreeing with all the parties and all the judges except a lone panel judge who became interested *sua sponte* in his particular view. Executive Petitioners supported standing for good reason. Unlike the typical

Minority Whip. The participation of the Speaker and Bipartisan Leadership Group is a normal mechanism for the House of Representatives to present its institutional position in litigation. See note 7, *infra*.

² *Edwards v. United States*, 286 U.S. 482, 486, 493 (1932).

³ Judge McGowan’s able opinion for the court of appeals largely consists of reaffirmation of the settled rule firmly established in the past, and sensibly followed by this Administration’s predecessors, that the Clerk of the House can receive veto messages during Congressional adjournments much as the Executive Clerk and the Clerk of the Supreme Court receive bills and pleadings when the President or the Court are away. See *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624 (Ct. Cl. 1964) (bill may be presented while the President is overseas), *cert. denied*, 380 U.S. 950 (1965); Sup. Ct. R. 44.5 (describing how a pleading “to the Court is received in vacation”); compare F.R.A.P. 45(a) (although a court of appeals may not be in session, it “shall be deemed always open for the purpose of filing any proper paper” with its Clerk) with H.R. Rule III(5) (House Clerk receives messages during adjournments).

Congressional standing case, here the Senate and House parties (“Houses”) themselves intervened, to present the institutional interest rather than merely the interests of individual Members. Moreover, the interest involved does not concern execution of the law, but the interest of the Members and Houses of Congress in the lawmaking process itself. As discussed below, the petitioners’ mootness question is just a variant of their standing question.

In sum, this is not a case in which the United States government presents a sound need for Supreme Court review. Rather, the Executive Branch of one Administration proffers an extreme theory regarding pocket vetoes which is out of line with the settled rule of the courts, prior Administrations, and Congress, and urges in addition a question of standing not briefed below which petitioners themselves correctly disavowed in the court of appeals. Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

Petitioners’ statement of the case omits key aspects of the proceedings which amply demonstrate the inappropriateness of Supreme Court review. Accordingly, the House parties provide a counterstatement.

1. On November 18, 1983, Congress presented the President with H.R. 4042, 98th Cong., 1st Sess., a bill concerning human rights certification for El Salvador, which had been passed by majority vote in both Houses, See App. 4a-5a and App. 141a-145a. Pursuant to the Pocket Veto Clause of the Constitution, art. I, § 7, cl. 2,⁴ the President had ten days (Sundays excluded), or until November 30, 1983, to decide between two courses: to return veto the bill, that is, return the bill to the House of Representatives, the originating chamber, with his objections; or, to

⁴ In pertinent part, the clause provides:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

let the bill become law with or without his signature. Since Congress had adjourned, the President would have returned a veto message to the Clerk of the House.⁵ As discussed below, the settled rule has been that return of a bill with objections to the Clerk of the House satisfies the Pocket Veto Clause's requirements, much as presentation of a bill to the Executive Clerk satisfies the Clause's requirements for presentation to the President.

President Reagan chose not to return veto the bill. Instead, on November 30, 1983, the White House issued a statement withholding approval, *see* App. 5a, based on a novel belief that the President could simply disapprove without any return to the Congress, and thus deny Congress any opportunity to consider and override the objections by a two-thirds majority of each House. In light of that novel belief, petitioner declined to publish H.R. 4042 as a public law of the United States, *see* App. 6a.⁶

2. Plaintiff Members of Congress filed suit against petitioners in the United States District Court for the District of Columbia to vindicate plaintiffs' "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). The Executive Branch defended petitioners, and the Houses intervened in support of the plaintiff Members. *See* App. 3a n.3.⁷ In district court, the Executive Branch chose con-

⁵ H.R. Rule III(5), reprinted in H. Doc. No. 277, 98th Cong., 2d Sess. § 647b (1985), provides: "The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session."

⁶ The duty of publishing bills that have become law has been inherited by Petitioner Frank G. Burke, Archivist of the United States. Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (1984).

⁷ The Speaker and Bipartisan Leadership Group serve as the regular mechanism for the House of Representatives to present its institutional position in constitutional litigation. *See, e.g., In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984) (upholding statute defended by Speaker and Bipartisan Leadership Group); *appeal argued*, 84-2805, *et al.* (9th Cir. July 9, 1985); *In re Tom Carter Enterprises, Inc.*, 44 Bankr. 605

Continued

sciously not to brief or argue any challenge to standing. On cross-motions for summary judgment, the District Court (Jackson, J.) ruled for the Executive defendants on the merits, the only issue presented, *see* App. 119a-132a, and the Members and Houses appealed.

In the court of appeals (Robinson, C.J., and McGowan and Bork, JJ.), the Executive defendants again chose consciously not to brief or argue a challenge regarding standing. The Executive maintains in its Petition for Certiorari that it took that position because of "established circuit precedent." Petition for Certiorari at 5 n.2. The reality is otherwise. Assistant Attorney General Richard Willard made emphatically clear in his argument to the court of appeals that "[a]s the Executive Branch itself concedes, Congress clearly has standing to litigate the specific constitutional question presented." App. 15a, 17a (citing Tape Recording of Oral Argument at 204-11).

One judge, Judge Bork, became interested *sua sponte* in his particular view of standing, and not satisfied with Assistant Attorney General Willard's concurrence in the judgment of all the parties and all the other judges, insisted on pressing the issue, but the Executive did not change its position, yet. Rather, Assistant Attorney General Willard presented the reasons why the Executive had not contested standing:

(C.D. Cal. 1984) (same); *In re Moens*, No. 84-4109, *et seq.* (C.D. Ill. Feb. 21, 1985) (same), *appeal docketed*, No. 85-1499 (7th Cir. Mar. 27, 1985); *In re Moody*, 46 Bankr. 231 (M.D.N.C. 1985) (same), *transferred and notice of appeal filed*, No. 85-606 (S.D. Tex. Mar. 11, 1985); *In re Production Steel, Inc.*, 48 Bankr. 841 (M.D. Tenn. 1985) (same); *In re WHET, Inc.*, No. 84-2985-T (D. Mass.), *summarily aff'd*, No. 85-1119 (1st Cir. May 1, 1985) (dismissing challenge to statute, in appeal defended by Speaker and Bipartisan Leadership Group); *Ameron, Inc. v. U.S. Army Corps of Engineers*, Civ. No. 85-1064 (D.N.J. filed Mar. 27, 1985) (upholding statute defended by Speaker and Bipartisan Leadership Group), *appeal pending*, Nos. 85-5226, 85-5377 (3d Cir.); *Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN (C.D. Cal. filed Nov. 21, 1985) (same); *Pitney Bowes, Inc. v. United States*, No. 85-0832 (D.D.C. filed Mar. 13, 1985) (resolving case without reaching issue of statute defended by Speaker and Bipartisan Leadership Group).

QUESTION: Why is there Article III standing here? Does the government take the position that there is Article III standing?

Mr. WILLARD: The government conceded in *Kennedy v. Sampson* that the Senate as a body would have had standing in that case, and since they have injected the standing in an individual Senator to raise a challenge, the Senate is alleging injury to its corporate interests, that is its interests as a body in being able to consider legislation after. . . . My point was simply that this case is different because we have the collective body that is the Senate as a Plaintiff here under statutory authority.

QUESTION: That doesn't make any difference—are you saying that doesn't make any difference under Article III standing?

Mr. WILLARD: We believe it does make a difference, that is for Article III purposes because the character of the injury collectively or separate by the Senate is different from that suffered by an individual. . . .

QUESTION: Doesn't the Senate as a body, when it intervenes, represent all citizens?

Mr. WILLARD: I don't believe they claim to do so.

QUESTION: What interests does the Senate as a body have other than the interest of seeing that constitutional government is properly maintained, which is really the interests of the citizens?

Mr. WILLARD: Well, it—

QUESTION: They do in their capacity, don't they?

Mr. WILLARD: I don't agree, Judge Bork. I don't think they claim to and I don't think they do. I think they sue in an institutional capacity as one-half of one of the three branches of government.

QUESTION: But does the institution have any interest to assert other than the interests of the citizens generally?

Mr. WILLARD: Yes, Judge Bork, I think it does. I think its interest is preserving what is an allocation of powers under the Constitution, just as the Executive has an interest in preserving its institutional—

QUESTION: You have a property right in the Senate as opposed to its representation of citizens,

separating the interest of its powers from the interests of the electorate?

Mr. WILLARD: That is correct, Judge Bork.

3a. On June 4, 1984, the court of appeals ruled in favor of respondents, in a scholarly opinion by Judge McGowan. See App. 1a-46a. The opinion began with the facts and the prior proceedings, App. 1a-8a, and discussed, on the merits of the pocket veto, the views of the Framers and the key prior opinions on the pocket veto: *The Pocket Veto Case*, 279 U.S. 655 (1929); *Wright v. United States*, 302 U.S. 583 (1938); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). See App. 18a-33a. The court summed up in the two quotations from this Court which it emphasized. First, the Pocket Veto Clause's two fundamental purposes are to preserve the President's opportunity "to consider the bills presented to him," and Congress's opportunity "to consider [the President's] objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." App. 29a (quoting *Wright v. United States*, *supra*, 302 U.S. at 596). As Judge McGowan noted, "[t]he [Supreme] Court plainly stated: 'We should not adopt a construction which would frustrate either of these purposes.'" App. 29a (emphasis deleted) (quoting *Wright*, 302 U.S. at 596). Second, "[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return," App. 27a (emphasis deleted) (quoting *Wright*, 302 U.S. at 589).

In rejecting petitioners' arguments, the court of appeals discussed how this Administration's position deviated from its predecessors:

That intersession adjournments no longer present any real obstacle to the President's exercise of his qualified veto power was recognized by Presidents Ford and Carter, both of whom assumed the effectiveness of return vetoes made during such an adjournment.

App. 37a. Furthermore, the court of appeals identified the extreme nature of petitioners' claim:

Conceding the absence of any practical difference between intrasession and intersession adjournments, [*Executive defendants*] contend that the truly correct "bright line" must be drawn at the three-day mark. Thus, if the tenth day after presentment falls during an adjournment of over three days, a bill that has not yet been returned expires by pocket veto. . . .

App. 42a (emphasis supplied).

3b. Judge Bork dissented at length, but addressed only the standing issue which he had raised *sua sponte* and which, he noted, had been conceded by petitioners. App. 49a n.1 (Bork, J., dissenting) ("The Executive Branch conceded at oral argument that the Senate has standing to sue in this suit. Similarly, in *Kennedy v. Sampson*, 511 F.2d 430, 435 (D.C. Cir. 1974), the Executive Branch conceded that either House of Congress would have standing to sue. . . ."). The panel opinion for the Court of Appeals responded to that limited dissent by discussing the firm basis of the standing of the Members and Houses, quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939) ("these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes"). App. 15a. Judge McGowan relied heavily on Justice Powell's trenchant concurrence in *Goldwater v. Carter*, 444 U.S. 996 (1979), regarding the justiciability of a case such as this.⁸ Basically, the court of appeals accepted Assistant Attorney General Willard's position and argument, noting that:

⁸ As the court of appeals noted, Justice Powell distinguished between the situation in *Goldwater*, in which "Congress has taken no official action. . . . [and] we do not know whether there ever will be an actual controversy between the Legislative and Executive Branches," and other cases such as this one, in which a dispute between Congress and the President should be resolved because "the political branches reach[ed] a constitutional impasse." App. 14a (quoting *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring)).

As the Executive Branch itself concedes, Congress clearly has standing to litigate the specific constitutional question presented. . . . While, as the dissent correctly observes, parties may not create jurisdiction by mere stipulation, an interpretation of Article III's "case or controversy" requirement by a coordinate branch of the federal government must not be wholly disregarded.

App. 17a & n.16 (citing Tape Recording of Oral Argument at 204-11.)

Only then, after petitioners lost on the merits, did they change position regarding standing. Petitioners say only that they changed position due to "further consideration," Petition for Certiorari at 5 n.2. Understandably, when petitioners argued the standing question for the first time, together with mootness, in requests for rehearing and rehearing en banc, the court of appeals did not find the newly-embraced arguments overwhelming.⁹ In fact, of the ten judges considering rehearing en banc, only three even voted to set the matter for argument. See App. 135a-136a.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE COURT OF APPEALS REAFFIRMED A SETTLED AND SOUND RULE REGARDING THE POCKET VETO

1. Petitioners seek certiorari to challenge the settled rule that duly authorized Congressional officers can receive veto messages during adjournments. At the outset, this Court should note that there has been no division in the circuits regarding that rule. Both during and since Judge Tamm's opinion in *Kennedy v. Sampson*, *supra*, not one appellate judge—in the D.C. Circuit or elsewhere—has even questioned that rule. In fact, the Executive de-

⁹ The House parties consistently refer in this opposition to petitioners' not having briefed the standing issue below. This is not to deny their having addressed it in their rehearing pleadings, but merely to distinguish pre-decision submissions from post-decision submissions.

fendants in *Kennedy v. Sampson*, acting at that time through Solicitor General Bork, did not even seek certiorari. Rather, Attorney General Levi announced that the Executive would follow the rule, the Justice Department settled another suit raising the matter, App. 37a n.32, and the rule took its place among issues of law settled and resolved.

2. That rule has been settled for good reason. The Pocket Veto Clause does not authorize pocket vetoes during all adjournments, but only when "the Congress, by their Adjournment, prevent [the bill's] Return." *U.S. Constitution*, art. I, § 7, cl. 2 (emphasis supplied). In 1929, this Court commented, in dictum, that "delivery of the [return vetoed] bill to some individual" would be "fictitious," *The Pocket Veto Case*, *supra*, 279 U.S. at 685, but that statement was purely hypothetical. Only in *Wright v. United States*, *supra*, was the matter presented concretely, and there the Court upheld return to an authorized officer as adequate. The Court overruled its 1929 expressions, agreeing with counsel for the House of Representatives that "[t]he Houses of Congress have officers and agents of great power and responsibility who act in their stead, and who are constantly in their places when the Houses . . . are not in session." ¹⁰ There was "nothing in the Constitution which denies the right to the use of these agents in effecting the return of objected-to bills." *Id.*, 302 U.S. at 591.

Kennedy v. Sampson applied the *Wright* rule in confirming the adequacy of return to an authorized officer during adjournments. While that case concerned intrasession adjournments, since *Kennedy v. Sampson* the pocket veto has been reserved for use only during the final adjournments at the end of each two-year Congress. As petitioners conceded in District Court, there is no

¹⁰ *Id.*, 302 U.S. at 591 (quoting the argument that had been presented in *The Pocket Veto Case* by Representative Hatton W. Sumners, on behalf of *amicus curiae* Committee on the Judiciary of the House of Representatives).

practical difference today between intrasession and intersession adjournments, App. 7a, 33a,¹¹ and accordingly, President Ford accepted return of messages to authorized officers as adequate during intra- and intersession adjournments. President Carter and, at first, even President Reagan continued to accept such returns during adjournments. App. 36a-37a nn.31-32.

3. Petitioners propose that during every adjournment of the Congress more than three days in duration the President should pocket veto rather than return veto.¹² Their

¹¹ Petitioners misleadingly comment about adjournments that are longer in duration than others, and intersession as opposed to intrasession adjournments, Petition for Certiorari at 23-26, when their actual position is that the President can pocket veto bills during all adjournments of the Congress, intersession or intrasession, longer than three days, *id.* at 27-28. In any event, Judge McGowan's opinion amply demonstrated the absence of any such distinction that could soundly be drawn, App. 29a-45a. At the time of *The Pocket Veto Case* in 1929, prior to the passage of the Twentieth Amendment in 1933, the intersession adjournment "divided two very different sessions of Congress, a 'long' session and a 'lame duck' session," App. 33a n.26. Thus, the intersession adjournment, a lengthy break between very different sessions, differed sharply from the mere intrasession adjournment, a short pause for Christmas and New Year's that did not separate anything very different. See *Kennedy v. Sampson*, *supra*, 511 F. 2d at 442-44 (listing pre-1933 intrasession adjournments).

In abolishing the regular "lame duck" session, the Twentieth Amendment abolished the difference between sessions that had marked previous intersession adjournments. Now, the intersession adjournment typically serves the function that had been served by the intrasession adjournment, as the break for Christmas and New Year's. The court of appeals recognized and petitioners concede, Petition for Certiorari at 23, that the duration of intersession adjournments has correspondingly diminished, as befits its current role.

¹² The Executive argued that the constitutional requirement that the two Houses agree on adjournments longer than three days creates a "bright line" somehow pertinent to the pocket veto. The court of appeals analyzed this thoroughly, and concluded that "[t]o choose a three-day line . . . simply because it is a line ignores the [Supreme] Court's mandate and the purpose of the pocket veto clause." App. 45a. Nevertheless, petitioners proffer that same theory to this Court, arguing for their "well-defined rule that the Pocket Veto Clause applies

Continued

proposal for a "three-day rule," App. 42a-43a, not only swings far out of line with the settled rule, the view of prior Administrations, and the bicameral and bipartisan position of the Congress, but also carries extreme implications in practice. For the President to pocket veto bills even over a three-day weekend would drastically upset the system of checks and balances. To illustrate, the House Calendar regularly collects in one section the "Bills Through Conference," which are the bills, numbering eighty-two in the 97th Congress, which were reported back from a conference committee. Typically, these are the most important and controversial bills presented to the President.

Pursuant to petitioners' theory of the three-day rule, of those eighty-two bills, sixty-one would have been subject to pocket veto.¹³ In other words, petitioners would immunize seventy-four percent of the President's vetoes of such bills from override. Only twenty-one bills, or twenty-six percent, were subject to return veto under the proposed three-day rule.¹⁴ As Judge McGowan noted, petitioners' theory of the three-day rule "deprives Congress of the final word on a significant portion of its legislation *and grants the President an absolute veto*," App. 39a (emphasis supplied). When the Framers conferred on the Presi-

when 'the Congress' has adjourned," Petition for Certiorari at 27-28, meaning any adjournment of both Houses, which includes all adjournments more than three days in duration.

¹³ A table of these bills which was provided as an appendix to the brief for the House parties in the court of appeals is appended to this opposition.

¹⁴ A factor not immediately apparent is that typically it takes several days after a final vote to prepare a bill for presentation to the President. The necessary preliminary to presentation—"enrollment," which makes certain that every word and punctuation mark in the bill matches what the Houses decided during the processes of floor and conference consideration—requires meticulous checking of the bill. Hence, if the pocket veto were available for all adjournments of the Congress, it would sweep up not only the bills voted on the eve of adjournment, but those voted considerably earlier but presented only within ten days of adjournment.

dent a qualified, but not absolute, veto which could be overridden by a two-thirds majority of both Houses of Congress, they made one of their most profound and enduring commitments regarding the system of checks and balances. The settled rule regarding the pocket veto preserves that system of checks and balances, which petitioners' extreme theory would disrupt.

As described above, the Pocket Veto Clause serves a serious purpose: to assure that the President's guaranteed ten days to decide between signing or vetoing a bill will not be "destroyed" or "cut down." Supreme Court review of the issue should await an instance of deprivation of that guaranteed time. It should not be granted just to air again an extreme theory, far out of line with the settled rule, prior Administrations, and Congress, which was soundly rejected below.

II.

THIS IS NOT AN APPROPRIATE CASE TO REVIEW THE STANDING OR MOOTNESS ISSUES

Regarding respondents' standing, the court of appeals followed standards enunciated by this Court with which even the Executive Branch has hitherto agreed. The proceedings below show that even if this Court were inclined to review some Congressional standing case, this is not the appropriate one.

1. This Court has stated repeatedly that legislators have standing to protect their "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)); see also *Dyer v. Blair*, 390 F. Supp. 1291, 1297 n.12 (N.D. Ill. 1975) (three-judge court) (Stevens, J.). The court of appeals simply followed those cases, which it discussed thoroughly and which the Petition for Certiorari omits to mention. Whatever separate issues arise when individual Members of Congress sue on their own because of the collegial nature of Congressional activity, in this case the Houses themselves in-

tervened in support of the Member plaintiffs. Even the Executive had hitherto agreed, in *Kennedy v. Sampson*, *supra*, that the Houses had standing in such a case, and the Executive's position in this case continued to concede that, until petitioners' late shift in position after the court of appeals ruled.

Petitioners do not argue that there is any division in the circuits, but seek review nonetheless by contending that the "doctrine of congressional standing [is] unique to the District of Columbia Circuit," Petition for Certiorari at 16-17. That contention is incorrect. Since the court of appeals follows *Baker v. Carr*, *supra*, and *Coleman v. Miller*, *supra*, naturally the other circuits follow the same rule, praising the D.C. Circuit for taking the Supreme Court's commands and "articulat[ing] a comprehensive jurisprudential theory defining the basis on which the courts should or should not dismiss suits filed by congressional plaintiffs against the executive branch." *Dennis v. Luis*, 741 F.2d 628, 632 (3d Cir. 1984).¹⁵

2. Even assuming *arguendo* that at some point this Court wishes to reconsider its pronouncements in *Baker v. Carr*, *supra*, and *Coleman v. Miller*, *supra*, this is not an appropriate case to review the issue of legislative standing. Petitioners failed to brief the issue below, and as described above, Assistant Attorney General Willard argued in favor of standing when questioned during argument in the court of appeals. Therefore, what petitioners proffer for review is an able opinion for the court of appeals which accepted petitioners' own undisputed arguments. An issue not briefed below, in which the parties

¹⁵ For cases in other circuits following *Kennedy v. Sampson* or the D.C. Circuit's test generally, see *Dennis v. Luis*, *supra*; *Bordallo v. Camacho*, 520 F.2d 763, 764 (9th Cir. 1975); *Dellums v. Smith*, 573 F. Supp. 1489 (N.D. Cal. 1983); *McRae v. Mathews*, 421 F. Supp. 533, 540 (E.D.N.Y. 1976). Some cases arise from legislatures and courts in United States possessions such as the Virgin Islands, rather than from Congress and mainland district courts, but the courts of appeals deem this "a distinction without substance concerning the issue of standing." *Dennis v. Luis*, *supra*, 741 F.2d at 630 n.3.

challenging the opinion now are parties whose views were accepted below, has simply not matured sufficiently for review by this Court. This Court derives substantial benefits from opinions of courts below rendered on the basis of adversary presentations, and from receiving briefing and argument from counsel who have refined their position through such presentations. The House parties submit, and the jurisprudential needs of this Court require, that this Court not be deprived of the benefits of the normal evolutionary process by which sufficiently defined conflicts are presented for review simply because one party seeks, belatedly, to rely on the view of a lone dissenting judge.

Moreover, the fact that one lone dissenting judge below insisted on his particular view, generated *sua sponte* without briefing or adversary argument, against the judgment of all the parties and all his colleagues, hardly served to replace such adversary proceedings, for his view was so idiosyncratic that even the petitioners who selectively quote from it do not actually embrace it. Judge Bork's dissent disputes the validity of any "governmental standing," that is, any occasion when "states or their legislators, executives, or judges" could sue "various branches of the federal government." App. 54a. As the court of appeals noted, this view would require overruling an overwhelming number of this Court's precedents,¹⁶ and runs directly counter to Justice Powell's recent sound instruction that "a dispute between Congress and the

¹⁶ App. 10a-11a (citing *INS v. Chadha*, 462 U.S. 919 (1983); *Nixon v. Administrator of General Services*, 433 U.S. 425, 439 (1977); *National League of Cities v. Usery*, 426 U.S. 833, 837, & n.7 (1976), overruled on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 154-56 (1953); *United States v. ICC*, 337 U.S. 426, 430 (1949); and *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). The list should also include *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). In fact, even though the dissenting judge has had a short tenure, his particular view required him to disavow some opinions in which he himself participated already. See App. 54a n.2.

President is ready for judicial review when 'each branch has taken action asserting its constitutional authority'—when, in short, 'the political branches reach a constitutional impasse.'" App. 14a (emphasis in original) (quoting *Goldwater v. Carter*, 444 U.S. 996, 997 (1979)). It is not surprising that the Petition for Certiorari quotes the rhetorical devices appearing in the dissent rather than its basic position, but this only emphasizes that nothing written below addressed what petitioners would present in this Court.

Moreover, this case lacks the characteristics of typical Congressional standing cases. More often than not, such cases concern failure to execute the law, not, as here, the lawmaking process itself. Moreover, Members bring such cases individually, without intervention by the Houses.¹⁷ In light of those two characteristics, motions to dismiss such cases on threshold grounds usually succeed, and in any event are tested under doctrines not applicable in this case.¹⁸ This case has none of these characteristics,

¹⁷ For cases in the D.C. Circuit alone in which individual Members have sued, without intervention by the Houses to support them, see, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984); *United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984); *Moore v. U.S. House of Representatives*, 733 F.2d 946, cert. denied, 105 S. Ct. 779 (1985); *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (per curiam), cert. denied, 104 S. Ct. 3533 (1984); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1982), cert. denied, 464 U.S. 823 (1983); *AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); *Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978); *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977); *Metcalf v. National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977); *Conyers v. Reagan*, 578 F. Supp. 324 (D.D.C. 1984), appeal dismissed, 765 F.2d 1124 (D.C. Cir. 1985); and, *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596 (D.D.C. 1983), aff'd, 770 F.2d 202 (D.C. Cir. 1985).

¹⁸ App. 14a (remedial discretion doctrine).

and it would provide an inappropriate vehicle for considering the issue as it arises in the typical cases.¹⁹

3. Finally, petitioners' mootness question is merely a variant on their standing question. Petitioners contend that because H.R. 4042 has "by its own terms expired," the "mere publication of the bill would at this point vindicate no interest of respondents," so that the case is moot. Petition for Certiorari at 10-11.²⁰ Petitioners cite *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1972), Petition for Certiorari at 12, where a potentially liable taxpayer sought an injunction against the operation of a state tax statute, and this Court held that after the statute was repealed, "[t]his relief is, of course, inappropriate now that the statute has been repealed." 404 U.S. at 415.

However, the Members and Houses assert the rights specified for them in the lawmaking process to have petitioner Burke publish H.R. 4042 as a public law, not an injunction concerning the operation of the statute. The relief sought is entirely appropriate for the interest asserted. That the petitioner has continued his refusal to publish the law for several years, even in the face of a declaratory judgment against him, does not impair respondents' interest; when petitioner respects respondents'

¹⁹ See *INS v. Chadha*, 462 U.S. 919, 940 (1983) (describing and approving an appearance by "both Houses of Congress" in holding that "Congress is the proper party to defend the validity of a statute . . ."). For the Court to address again, only two years later, one of the very few cases, like *Chadha*, in which the Houses have intervened, will not shed light on the different and more common cases in which individual legislators appear by themselves.

²⁰ Petitioners' analogy to *National Organization for Women, Inc. (NOW) v. Idaho*, 459 U.S. 809 (1982), is far-fetched. In that case, the proposed constitutional amendment failed, with or without the state ratification recissions under challenge. Here, the proposed H.R. 4042 succeeded. There is no comparison between the mere desire in *NOW v. Idaho* to record an unsuccessful effort at enactment, and the interest here in vindicating the successful lawmaking process.

interest, he publishes many laws that have expired.²¹ Petitioners may dispute that the Members and Houses have standing to pursue their "plain, direct and adequate interest in maintaining the effectiveness of their votes," *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)), but that is no more than a variant of their standing question.²² The only difference is that petitioners seek, on this question, for this Court to rush into a hasty and unwise summary decision without receiving briefing or argument—a request extraordinary in the extreme, considering that the courts below received from petitioners no briefing or adversary argument prior to decision on any justiciability question.

CONCLUSION

The petition for certiorari should be denied.

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²¹See, e.g., H.J. Res. 653, 656, 659, 663, 98th Cong., 2d Sess. (1984) (respectively Pub. L. Nos. 98-441, 98-453, 98-455, and 98-461 and 98 Stat. 1699, 1731, 1747, and 1814) (continuing resolutions enacted, respectively, October 3, 5, 6, and 10, each expiring almost immediately).

²²Petitioners virtually concede that their mootness question is simply a variant on standing, repeatedly falling back, in their section on mootness, on arguments that "respondents lack standing," and that "they obviously would lack standing," *Petition for Certiorari* at 14, 16.

APPENDIX A: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
1	H.R. 3512	Supplemental Appropriation and Recession Act.	June 5, 1981	In session	No	P.L. 97-12.
2	H.R. 3520	Steel Industry Compliance Extension Act	July 8, 1981	In session	No	P.L. 97-23.
3	H.R. 31	Cash Discount Act	July 31, 1981	Intra adj. ¹	Pocket	P.L. 97-25.
4	S. 694	Department of Defense, Supplemental Authorization Act.	Aug. 5, 1981	Intra adj. ¹	Pocket	P.L. 97-39.
5	H.R. 4242	Economic Recovery Tax Act	Aug. 12, 1981	Intra adj. ¹	Pocket	P.L. 97-34.
6	H.R. 3982	Reconciliation Act, Omnibus	Aug. 12, 1981	Intra adj. ¹	Pocket	P.L. 97-35.
7	H.J. Res. 325	Continuing Appropriations	Oct. 1, 1981	Intra adj. ⁷	Pocket	P.L. 97-51.
8	S. 304	National Tourism Policy Act	Oct. 5, 1981	In session	No	P.L. 97-63.
9	S. 1181	Uniformed Services Pay Act	Oct. 14, 1981	In session	No	P.L. 97-60.
10	S. 815	Defense Department Authorization Act	Nov. 19, 1981	In session	No	P.L. 97-86.
11	H.R. 4144	Energy and Water Development Appropriations.	Nov. 23, 1981	1 House recess	No	P.L. 97-88.
12	H.R. 3454	Intelligence Authorization Act	Nov. 23, 1981	1 House recess	No	P.L. 97-89.
13	H.R. 3413	Department of Energy National Security and Military Applications of Nuclear Energy Authorization.	Nov. 23, 1981	1 House recess	No	P.L. 97-90.
14	H.R. 4522	District of Columbia Appropriations	Nov. 23, 1981	1 House recess	No	P.L. 97-91.
15	H.J. Res. 357	Appropriations, Continuing, Further	Nov. 23, 1981	1 House recess	No	Return Vetoes.
16	S. 1098	NASA Authorization	Dec. 10, 1981	Inter adj. ²	Pocket	P.L. 97-96.
17	H.R. 3455	Military Construction Authorization	Dec. 11, 1981	Inter adj. ²	Pocket	P.L. 97-99.
18	H.R. 4035	Interior and Related Agencies Appropriations.	Dec. 11, 1981	Inter adj. ²	Pocket	P.L. 97-100.
19	H.R. 4034	Housing and Urban Development—Independent Agencies Appropriations.	Dec. 11, 1981	Inter adj. ²	Pocket	P.L. 97-101.

APPENDIX A: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO—Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
20	H.R. 4209.....	Transportation and Related Agencies Appropriations.	Dec. 16, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-102.
21	H.R. 4119.....	Agriculture, Rural Development and Related Agencies Appropriations.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-103.
22	H.R. 4241.....	Military Construction Appropriations.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-106.
23	S. 1086.....	Older Americans Act Amendments.....	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-115.
24	H.R. 4503.....	Water Pollution Control Act Amendments.....	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-117.
25	H.R. 4331.....	Social Security Minimum Benefits.....	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-123.
26	S. 1211.....	Toxic Substance Control Act Extension.....	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-129.
27	H.R. 3567.....	Export Administration Amendments Act.....	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-145.
28	S. 884.....	Agriculture and Food Act.....	Dec. 21, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-98.
29	S. 1196.....	International Security and Development Cooperation Act.	Dec. 22, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-113.
30	H.R. 4995.....	Department of Defense Appropriation Act.....	Dec. 22, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-114.
31	H.R. 4559.....	Foreign Assistance Appropriations.....	Dec. 22, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-121.
32	S. 1503.....	Petroleum Allocation Act, Standby.....	Mar. 9, 1982.....	Brief recess.....	No.....	Return Vetoed.
33	H.R. 4.....	Intelligence Identities Protection Act.....	June 15, 1982.....	Brief recess.....	No.....	P.L. 97-200.
34	H.R. 5922.....	Appropriations, Supplemental, Urgent.....	June 24, 1982.....	Intra adj. ²	Pocket.....	Return Vetoed.
35	H.R. 6685.....	Supplemental Appropriations, Urgent.....	July 16, 1982.....	In session.....	No.....	P.L. 97-216.
36	S. 2332.....	Energy Emergency Preparedness Act, National.	Aug. 2, 1982.....	In session.....	No.....	P.L. 97-229.
37	S. 1193.....	International Communication Agency and Board for International Broadcasting Appropriations, Authorization.	Aug. 12, 1982.....	Intra adj. ⁴	Pocket.....	P.L. 97-241.
38	H.R. 6530.....	Mount St. Helens National Volcanic Area, Establish.	Aug. 20, 1982.....	Intra adj. ⁴	Pocket.....	P.L. 97-243.

39	H.R. 6963.....	Supplemental Appropriation Act.....	Aug. 23, 1982.....	Intra adj. ⁴	Pocket.....	Return Vetoed Overridden, P.L. 97-257.
40	S. 2248.....	Department of Defense Authorization Act.....	Aug. 27, 1982.....	In session.....	No.....	P.L. 97-252.
41	H.R. 6955.....	Omnibus Budget Reconciliation Act.....	Aug. 27, 1982.....	In session.....	No.....	P.L. 97-253.
42	H.R. 4961.....	Miscellaneous Revenue Act.....	Sept. 2, 1982.....	In session.....	No.....	P.L. 97-248.
43	H.R. 3239.....	Federal Communications Commission Authorization Act.	Sept. 2, 1982.....	In session.....	No.....	P.L. 97-259.
44	H.R. 3663.....	Bus Regulatory Act.....	Sept. 8, 1982.....	In session.....	No.....	P.L. 97-261.
45	S. 923.....	Pre-Trial Services Act.....	Sept. 16, 1982.....	In session.....	No.....	P.L. 97-267.
46	H.R. 6063.....	Intelligence Authorization Act.....	Sept. 16, 1982.....	In session.....	No.....	P.L. 97-269.
47	H.R. 6956.....	Housing and Urban Development—Independent Agencies Appropriations.	Sept. 30, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-272.
48	S. 1409.....	Buffalo Bill Dam and Reservoir Enlargement in Wyoming.	Oct. 1, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-293.
49	S. 2852.....	Sallie Mae Technical Amendments Act.....	Oct. 1, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-301.
50	H.R. 6133.....	Endangered Species Act Amendments.....	Oct. 1, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-304.
51	H.J. Res. 599.....	Continuing Appropriations.....	Oct. 2, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-276.
52	H.R. 5930.....	Aviation Insurance Program Extension.....	Oct. 2, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-309.
53	H.R. 6976.....	Missing Children Act.....	Oct. 4, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-292.
54	S. 2596.....	Military Construction Authorization Act.....	Oct. 4, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-321.
55	H.R. 6968.....	Military Construction Appropriations.....	Oct. 4, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-323.
56	S. 734.....	Export Trade Services.....	Oct. 5, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-290.
57	S. 2036.....	Job Training Partnership Act.....	Oct. 5, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-300.
58	H.R. 5890.....	NASA Authorization Act.....	Oct. 5, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-324.
59	S. 2457.....	District of Columbia Federal Payment Incentive Act.	Oct. 5, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-334.
60	S. 1018.....	Coastal Barrier Resources Act.....	Oct. 12, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-348.
61	H.R. 6267.....	Depository Institutions Amendments.....	Oct. 13, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-320.
62	H.R. 4717.....	Taxes, LIFO Recapture Effective Date.....	Oct. 13, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-362.
63	H.R. 4441.....	Copyright Office in the Library of Congress, Fees Submitted to, With Respect To.	Oct. 13, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-366.

APPENDIX A: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO—Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
64	H.R. 7019	Transportation and Related Agencies Appropriations.	Dec. 17, 1982	Final adj. ^a	Pocket	P.L. 97-369.
65	H.R. 7072	Agriculture, Rural Development and Related Agencies Appropriations.	Dec. 17, 1982	Final adj. ^a	Pocket	P.L. 97-370.
66	H.J. Res. 631	Continuing Appropriations, Further	Dec. 20, 1982	Final adj. ^a	Pocket	P.L. 97-377.
67	H.R. 7144	District of Columbia Appropriations	Dec. 21, 1982	Final adj. ^a	Pocket	P.L. 97-378.
68	H.R. 6946	False Identification Crime Control Act	Dec. 21, 1982	Final adj. ^a	Pocket	P.L. 97-398.
69	S. 2623	Indians, Tribally Controlled Community College Act Extension.	Dec. 22, 1982	Final adj. ^a	Pocket	Pocket Vetoes.
70	H.R. 7356	Interior and Related Agencies Appropriations.	Dec. 23, 1982	Final adj. ^a	Pocket	P.L. 97-394.
71	H.R. 5238	Orphan Drug Act	Dec. 23, 1982	Final adj. ^a	Pocket	P.L. 97-414.
72	H.R. 2330	Nuclear Regulatory Commission Authorization.	Dec. 23, 1982	Final adj. ^a	Pocket	P.L. 97-415.
73	H.R. 6211	Surface Transportation Assistance Act	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-424.
74	H.R. 5447	Futures Trading Act	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-444.
75	H.R. 4566	Tariff Schedules Amendments	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-446.
76	H.R. 6056	Technical Corrections Act	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-448.
77	H.R. 5002	Fishery Conservation and Management Improvement.	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-453.
78	H.R. 7093	Virgin Islands Taxes Revision	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-455.
79	H.R. 6094	U.S. International Trade Commission, U.S. Customs Service, U.S. Trade Representative Authorization.	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-456.
80	H.R. 3420	Pipeline Safety Authorization Act	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-468.

81	H.R. 5470	Periodic Payment Settlement Act	Jan. 3, 1983	Final adj. ^a	Pocket	P.L. 97-473.
82	H.R. 3963	Contract Services for Drug Dependent Federal Offenders Act Amendments.	Jan. 3, 1983	Final adj. ^a	Pocket	Pocket Vetoes.

This chart analyzes the bills listed in the 97th Congress's final House Calendar section on Bills Through Conference. In the column, "Status of Congress Ten Days After Presentation," "in session" means the originating House of the bill was in session ten days after presentation (Sundays excluded), regardless of the status of the nonoriginating House; "one house recess" means the originating House was in recess while the nonoriginating House was in session; "brief recess" means both Houses were in recess for three days or less, so that no adjournment resolution was necessary; "intra adj." means an intrasession adjournment; "inter adj." means the intersession adjournment; "final adj." means the final adjournment. In the column, "Subject to Pocket Veto," "pocket" means that ten days after presentation Congress was in an intrasession, intersession, or final adjournment. Several bills labeled "pocket" were return vetoed, either because the President return vetoed them before the end of ten days, or because the President returned them despite Congress being in adjournment.

The dates of adjournment, stated below in the footnotes, were from 1983-84 Congressional Directory at 423, 425. The House and Senate status when not governed by adjournment resolution (in session, 1 House recess, or brief recess) is from House and Senate Calendars.

^a S. Con. Res. 27 provided for adjournment of the House Aug. 4 to Sept. 9, 1981, and of the Senate Aug. 3 to Sept. 9, 1981.

^b S. Con. Res. 57 provided for *sine die* adjournment of the Congress Dec. 16, 1981.

^c H. Con. Res. 367 provided for adjournment of the House any day between June 28 and July 2, 1982, and of the Senate July 1 or July 2, 1982 to July 12, 1982. Pursuant to it, the House was in recess July 1 to July 12, 1982, and the Senate was in recess July 1 to July 12, 1982.

^d H. Con. Res. 399 provided for adjournment of the House Aug. 20 to Sept. 8, 1982, and of the Senate Aug. 19, Aug. 20, or Aug. 21 to Sept. 8, 1982. Pursuant to it, the Senate was in recess Aug. 20 to Sept. 8, 1982.

^e H. Con. Res. 421 provided for adjournment of Congress Oct. 1 or Oct. 2, 1982 to Nov. 29, 1982. Pursuant to it, Congress was in recess Oct. 1 to Nov. 29, 1982.

^f H. Con. Res. 488 provided for *sine die* adjournment of the House Dec. 20 or Dec. 21, 1982, and of the Senate anytime before Jan. 3, 1983. Pursuant to it, Congress adjourned Dec. 28, 1982.

^g H. Con. Res. 201 provided for adjournment of the House Oct. 7 to Oct. 13, 1981, and of the Senate Oct. 7 to Oct. 14, 1981.

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No. 85-781

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, AND RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

JOINT BRIEF OF RESPONDENTS MICHAEL D. BARNES, ET AL.,
AND THE UNITED STATES SENATE IN OPPOSITION
TO THE PETITION FOR CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

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JOINT BRIEF OF RESPONDENTS MICHAEL D. BARNES, ET AL., AND THE UNITED STATES SENATE IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondents, Representative Michael D. Barnes and the other members of the House of Representatives who were the original plaintiffs in this action, and the United States Senate, an intervenor in the district court, submit this joint opposition to the petition for certiorari. The court of appeals has decided neither the standing question nor the pocket veto question "in a way in conflict with applicable decisions of this Court," Sup. Ct. R. 17.1(c), or with those of another court of appeals, *id.*, 17.1(a). On the merits, the court of appeals held that the President's failure to return a bill to Congress with his objections, when Congress had not constitutionally prevented the bill's return, rendered the bill a law. This

ruling faithfully followed this Court's decisions in *Wright v. United States*, 302 U.S. 583 (1938), and *The Pocket Veto Case*, 279 U.S. 655 (1929). The court of appeals also strictly adhered to this Court's decisions, including *Coleman v. Miller*, 307 U.S. 433 (1939), in holding that respondents have standing to redress the failure of the Executive Clerk and the Administrator of General Services to perform their statutorily required ministerial duties of delivering, preserving, and publishing the bill as a law. Petitioners' actions nullify respondents' votes to enact the legislation and thereby eviscerate respondents' constitutional lawmaking roles.

Finally, petitioners' mootness question is merely another form of their challenge to respondents' standing and should not be resolved in the summary fashion proposed by petitioners. If the Court concludes that the mootness question may not be disposed of by denying certiorari, then respondents would support plenary review of the mootness issue along with any other questions that the Court determines to review.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE STANDING DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT

1. Respondents alleged in their complaints that the Executive Clerk of the White House and the Administrator of General Services were violating statutory provisions directing the former to deliver, and the latter to receive, to preserve, and to publish all bills that have become law under the Constitution.¹ Under respondents' view of the

¹ Complaint for Declaratory and Mandamus and/or Injunctive Relief, ¶¶ 12-13, 28-32 (Jan. 4, 1984); Complaint of Intervenor for Declaratory Relief, ¶¶ 4-5, 13-14, 17-20 (Jan. 27, 1984). Since the action was initiated, a reorganization statute has transferred these duties of the Administrator of General Services to the Archivist of the United States. Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (1984) (amending 1

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pocket veto clause, when the President had not returned H.R. 4042, 98th Congress (1983), to the Congress within ten days after its presentment to him, the bill had become "a Law, in like manner as if he had signed it." By failing to perform the ministerial steps required to complete the process by which federal legislation is enacted, petitioners are unlawfully nullifying the respondents' votes to enact H.R. 4042 into law and eviscerating their constitutional roles in the legislative process.

2. Until their supplemental petition for rehearing, the petitioners had conceded in the court of appeals that the Senate had standing to litigate its claim in this case. App. 15a, 17a & n.16, 49a n.1.² The Senate intervened in this action pursuant to a statute that authorizes the Senate Legal Counsel, when directed by a resolution of the Senate, to intervene "in the name of the Senate . . . in any legal action . . . in which the powers and responsibilities of Congress under the Constitution are placed in

U.S.C. §§ 106a, 112, 113 (Supp. II 1984)). Accordingly, petitioner Burke has been substituted as a party to this action.

Federal statute requires the Archivist to receive all laws from the President and "carefully [to] preserve the originals." 1 U.S.C. § 106a (Supp. II 1984). The Archivist is also required to cause to be compiled and published the United States Statutes at Large, "which shall contain all the laws . . . enacted. . . ." *Id.* § 112. Statute also provides for "publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist. . . ." *Id.* § 113. The Archivist is required to "furnish to the Public Printer a copy of every Act . . . as soon as possible . . . after it has become a law under the Constitution without [the President's] approval." 44 U.S.C.A. § 710 (West Supp. 1985). The Public Printer is responsible for printing copies of public laws in slip form. 44 U.S.C. § 709 (1982); 44 U.S.C.A. § 711 (West Supp. 1985). These statutes are set forth in an appendix bound with this brief, denominated Appendix H to be consecutive with the appendices to the petition for a writ of certiorari.

² Both the majority and Judge Bork appeared to view the constitutional issues of the Senate's standing and that of individual legislators as identical. *Ibid.* The petitioners understood correctly prior to their supplemental rehearing petition in the court of appeals that the standing of the Senate as a body to litigate this action suffices to establish standing.

issue." 2 U.S.C. § 288e(a) (1982). Recognizing the need for "standing . . . under section 2 of article III of the Constitution," *id.*, the intervention statute carries to the limits of Article III the Senate's standing to defend "the powers and responsibilities of Congress under the Constitution," *id.* This Court has established that "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who would otherwise be barred by prudential standing rules.' *Warth v. Seldin*, 422 U.S., [490] at 501 [(1975)]." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979); *accord Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring). The intervention statute constitutes, with the resolution of the Senate in this case, App. 3a n.3, "official action" manifesting that "the political branches [have] reach[ed] a constitutional impasse." *Goldwater v. Carter*, 444 U.S. 996, 998, 997 (1979) (Powell, J., concurring).

3. Petitioners posit that this action is no more than a suit to enforce H.R. 4042, and then argue that "Congress and its members are not injured in any fashion distinct from that of citizens generally by the President's failure to enforce a law." Pet. at 20. But respondents did not sue to enforce the substantive requirements of H.R. 4042. Rather, this suit seeks adherence of Executive officials to ministerial statutes that implement the constitutional design for the legislative process by requiring the preservation and publication as law of bills that have completed the constitutional procedure for enactment.³ Although in

³ Thus, respondents did not bring this action against the officials in the Departments of State or Treasury who acted inconsistently with the requirements of H.R. 4042, because respondents were not seeking an order that H.R. 4042 be enforced. Nor did they sue the President, contrary to the assertions of petitioners, Pet. 10, 17, 20, 22, and Judge Bork, App. 47a, 48a, 49a, 57a, 111a. Rather, respondents sued only the officials who had acted inconsistently with 1 U.S.C. §§ 106a, 112, and 113 (Supp. II 1984). They alleged neither that the President acted unconstitutionally in failing either to sign or to return H.R. 4042 with

Continued

some situations individuals may have standing to claim that pocket vetoed bills are law, the legislative branch, which has a "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U.S. 83, 102 (1968), always suffers a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), when the responsible officials fail to preserve and to publish its enactments.

In putting into effect the Constitution which many of its members had participated in drafting, the First Congress enacted into law its understanding that the preservation of laws is the natural completion of the process of enacting them. The petitioner Acting Archivist is the heir, in 1 U.S.C. § 106a (Supp. II 1984), to the original responsibility of the Secretary of State to receive forthwith from the President and to "carefully preserve the originals" of all bills that had become law, including those bills that became law for not having been returned to the Congress with objections. Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. Subsequently, speaking of a law that had received the President's approval, this Court held that "when a bill, thus attested [by the presiding officer of each House], receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Field v. Clark*, 143 U.S. 649, 672 (1892) (emphasis added).

In addition to preservation, the First Congress established the related principle that completion of the law-making process requires the recording and publication of the laws. It charged the Secretary of State with the duty, on the receipt of bills which had become law, to "cause

his objections, nor that the President unlawfully failed to obey H.R. 4042. Instead, respondents alleged that, as a consequence of the President's entirely lawful decision not to act upon the bill, H.R. 4042 is a law under Art. I, § 7, cl. 2, of the Constitution. Respondents seek relief solely against the officials whose duty it is to cause H.R. 4042 to be preserved and published after it became law through the President's inaction.

the same to be recorded in books to be provided for the purpose," to publish them in public newspapers, and to "cause one printed copy to be delivered to each Senator and Representative of the United States, and two printed copies duly authenticated to be sent to the Executive authority of each State." Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68.

Recording and publication are now merged in the requirement that the Archivist cause the publication in slip form of "every Act and joint resolution, as soon as possible after its approval by the President, or after it has become a law under the Constitution without his approval." 44 U.S.C.A. § 710 (West Supp. 1985); 44 U.S.C. § 709 (1982). The Archivist must also cause the publication in the Statutes at Large of "all the laws . . . enacted during each regular session of Congress." 1 U.S.C. § 112 (Supp. II 1984).⁴ Just as the First Congress charged the Secretary of State with the duty of delivering to each Senator and Representative a copy of each printed law, current law continues to reflect Congress' direct interest in the receipt of printed evidence of its laws by providing that "[t]he Joint Committee on Printing shall control the number and distribution of the copies" of both the slip laws and the Statutes at Large. 44 U.S.C. § 709 (1982); *id.* § 728. Thus, members of Congress, as explicit beneficiaries of the requirement that enacted laws be published, are "within the zone of interests to be protected," *Asso-*

⁴ The publication of a statute provides the official notice of its enactment to the public. Once a statute has been published, any party may take notice of it and is free to initiate legal action, if necessary, to secure its benefits. Under federal law the "Statutes at Large shall be legal evidence of laws, . . . in all the courts of the United States, . . ." 1 U.S.C. § 112 (Supp. II 1984); *see id.* § 113 (same for slip laws). In a practical as well as a logical sense, the publication requirement is soundly viewed as the final step of the process by which legislation is enacted. In neither sense can the publication be "viewed as merely a formal acknowledgment." Pet. 14.

ciation of Data Processing Service Organizations v. Camp, 397 U.S. 150, 153 (1970), by the publication requirement.⁵

4. Respondents' underlying injury is the nullification of their constitutional lawmaking authority. Contrary to Judge Bork's assertion of the "complete novelty," App. 47a, of this controversy, which, he maintains, "for most of

⁵ Petitioners maintain "that it is plain that respondents lack standing to seek enforcement of these provisions," Pet. 14, relying on a statement of this Court in *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). In *Kissinger* the Court declined to infer a private right of action to enforce the Federal Records Act of 1950, 44 U.S.C. § 2901 *et seq.* (1982), and the Records Disposal Act, 44 U.S.C. § 3314 (1982), because "[t]he legislative history of the Acts reveals that their purpose was not to benefit private parties, but solely to benefit the agencies themselves and the Federal Government as a whole," 445 U.S. at 149.

This finding lends no support to petitioners' position for three reasons. First, the Court decided no standing issue in *Kissinger* but decided only the statutory question whether Congress had intended to grant a right of action to private individuals in enacting the particular records acts in that case. *Id.* at 149-50. The Court expressly reserved the question of the maintenance of an action alleging "that the administrators and the Attorney General have breached a duty to enforce the Records Act, since no such action was brought here." *Id.* at 150 n.5.

Second, the purpose of the statutes at issue in *Kissinger* is so dissimilar and unrelated to the purpose of the statutes underlying respondents' claim that the Court's observation has no relevance to this case. *Kissinger* concerned records management statutes that governed procedures for the retention and disposal of executive agency records. As the Court made clear, the purpose of these routine housekeeping statutes is to serve the administrative needs of executive agencies. *Id.* at 149. In contrast, the statutes at issue here serve the constitutional legislative function by prescribing the ministerial steps that result in a law's being treated as a law.

Finally, if the two sets of statutes were comparable, *Kissinger* would support, not undercut, congressional standing here. The Court established in *Kissinger* that *private* parties could not sue to enforce records management statutes, because they are intended "solely to benefit the agencies themselves and the Federal Government as a whole." *Ibid.* However, in this case respondents sued not as private parties, but as the branch of "the Federal Government as a whole" that is constitutionally responsible for enacting laws.

our history . . . would have been inconceivable," App. 48a, redressing interference with the exercise of governmental power is a revered purpose for the invocation of judicial authority. The very case that established the principle of judicial review, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was an action by a putative government official for the delivery of the commission necessary to furnish him with evidence of his constitutional authority to exercise governmental power.⁶ The parallel between this action and Marbury's suit is strong. Marbury asserted that under the Constitution he had been appointed a justice of the peace for the District of Columbia. He claimed that the Secretary of State had failed to perform a ministerial duty, delivery of his judicial commission, necessary to provide him with public evidence of the completion of his appointment and, consequently, of his authority to perform the duties of the office. Similarly, respondents here assert that, under the Constitution, they have enacted H.R. 4042 into law, and that the petitioners have failed to perform the ministerial duties necessary to furnish public evidence of their enactment.⁷

Since *Marbury* this Court has adjudicated actions by governmental litigants to establish their entitlement to

⁶ The Court recognized that Marbury was asserting his "right to the office itself. . . . He will obtain the office by obtaining the commission, . . ." *Id.* at 171-72. The Court contrasted Marbury's suit for a writ of mandamus to obtain the authority to sit as a judge with a suit for the value of the office, that is, a money judgment for his salary. *Ibid.* The Court approved Marbury's suing for his commission, instead of for his salary, because "[t]he value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing." *Ibid.*

⁷ Strikingly, the statute on which Marbury relied is the precise forerunner of the statutes underlying respondents' action. The basis for Marbury's action for a writ of mandamus against the Secretary of State was section 4 of the Act of September 15, 1789, which provided that the Secretary "shall keep the . . . seal [of the United States], and shall make out and record, and shall affix the said seal to all civil commissions, to officers of the United States, to be appointed. . . ." 1 Stat. 68.

exercise governmental power. For example, in *Coleman v. Miller*, 307 U.S. 433 (1939), members of the Kansas state senate who had voted against ratification of the proposed Child Labor Amendment to the U.S. Constitution alleged that their "votes against ratification have been overridden and virtually held for naught." *Id.* at 438. This Court held that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes. . . . They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect. . . ." *Ibid.* There is no principled distinction between a suit by state legislators to vindicate their votes, which were sufficient to prevent their state's ratification of a constitutional amendment, and an action by federal legislators to vindicate their votes, which were sufficient to enact a federal law.

Judge Bork is concerned that the standing decision of the court of appeals will give the states or the President the right to challenge national laws that intrude directly on their constitutional authority. App. 57a, 60a. They already have that right. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the State of South Carolina challenged the constitutionality of the Voting Rights Act of 1965. While holding that South Carolina lacked standing to raise several claims, including those grounded upon due process, the bill of attainder clause, and the separation of powers, *id.* at 323-24, the Court permitted South Carolina to challenge the Act's constitutionality "[a]s against the reserved powers of the States," *id.* at 324.⁸

⁸ *Coleman v. Miller* and *South Carolina v. Katzenbach* refute Judge Bork's contention that states never have standing to allege "an injury to governmental powers," but may sue only when "required by federal statute to expend money." App. 63a n.6. His view that *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled on other grounds, *Garcia v. San Antonio Metropolitan Transit Authority*, 105 S. Ct. 1005 (1985), demonstrates that pecuniary injury is the only "concrete injury in fact that confer[s] standing" upon states cannot be squared with the tradition of litigation by states to challenge federal

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Similarly, in *Nixon v. Administrator of General Services*, 433 U.S. 425, 439, 448-49 (1977), this Court recognized the right of both incumbent and former presidents to claim that a statute intrudes unconstitutionally on a presidential privilege. The standing decision of the court of appeals is consistent with this Court's determination that injury to the authority of governmental entities may confer standing.

5. The decision of the court of appeals does not depart from the principle, emphasized by petitioners, Pet. 17, and by Judge Bork, App. 70a, that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright*, 104 S.Ct. 3315, 3325 (1984). Contrary to petitioners' assertion that the separation of powers precludes resolving the pocket veto question in this case, the court of appeals carefully followed this Court's decisions regarding the constitutional structure of government. As Judge McGowan wrote for the court, "[b]y defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers." App. 18a.

No claim could be more fundamental to our representative system than respondents' claim that they have enacted a law. This Court articulated long ago its "duty . . . , from the performance of which it may not shrink, to give full effect to the provisions of the Constitution relating to the enactment of laws. . . ." *Field v. Clark*, 143 U.S. at 670. More recently the Court rejected the asser-

"usurpation of governmental powers." App. 63a n.6. Indeed, in *Coleman* this Court explicitly rejected the assertion that only pecuniary injury supports governmental standing:

This class of cases in which we have exercised our appellate jurisdiction on the application of state officers may be said to recognize that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question. In none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any "private damage."

307 U.S. at 445.

tion that the controversy over the legislative veto should be left to the political processes. Addressing the same constitutional clause involved in this suit, Art. I, § 7, cl. 2, the Court stated, "Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS v. Chadha*, 462 U.S. 919, 945 (1983). "[T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Id.* at 951. This Court has firmly held that disputes over the allocation of legislative authority under these provisions of the Constitution "cannot be evaded by courts because the issues have political implications. . . ." *Id.* at 943.

II.

THIS CASE IS NOT MOOT

1. This dispute remains a live, justiciable controversy, because the petitioners' denial of their statutory obligations to cause H.R. 4042 to be preserved and published as a law continues to injure respondents. Petitioners suggest that this action is moot, based upon their view that its vitality is dependent upon the current fiscal consequences arising from the enactment of H.R. 4042. This argument fails because it rests upon petitioners' misunderstanding of the suit as an attempt to enforce H.R. 4042. Because respondents seek to enforce, not H.R. 4042, but 1 U.S.C. § 106a and related provisions on publication, the existence of a justiciable controversy is not determined by the current effect of H.R. 4042.

Beginning with the Act of September 15, 1789, the Congress has required the publication of "every" law. When the Congress provided for a permanent official record of its enactments in the Statutes at Large, it directed the Attorney General to enter into a contract with Little and Brown for a work containing all laws "whether obsolete,

repealed, or in force, and whether temporary or permanent. . . .” Act of March 3, 1845, No. 10, § 2, 5 Stat. 798, 799. The Archivist must include in the Statutes at Large “all” the laws “enacted during each regular session of Congress.” 1 U.S.C. § 112 (Supp. II 1984). In performing their ministerial functions, the petitioners must cause to be published all bills that have become law without judging the effectiveness of any of them. Neither Congress’ interest in the preservation and publication of laws that it has enacted, nor petitioners’ correlative procedural duties under statute, are affected in any way by the substantive content of the laws.

The cases regarding subsequent changes in law, which petitioners cite to suggest that this controversy is moot, are therefore inapposite. It is undoubtedly true that a suit to challenge or to enforce a statute is moot once that statute has been repealed. *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam). Here, however, the preservation and publication statutes that respondents sued to enforce have not been repealed since this action was filed, but remain in full force and effect.⁹ The principle that intervening changes in law may moot actions in the course of their adjudication has no bearing on this controversy.¹⁰

⁹ The only change in these statutes since the filing of this action is their amendment to transfer duties from the Administrator of General Services to the Archivist of the United States. Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (1984) (amending 1 U.S.C. §§ 106a, 112, 113 (Supp. II 1984)).

¹⁰ This Court held in *Coleman v. Miller* that a group of Kansas state legislators cumulatively had a cognizable “interest in maintaining the effectiveness of their votes,” 307 U.S. at 438, without ascertaining whether their votes would have any ultimate legal effect. In particular, the legislators’ standing did not depend upon their demonstrating that their vote on Kansas’ ratification of a constitutional amendment would affect the amendment’s ratification or failure, as a part of the Constitution. The Court did not rule, as petitioners’ characterization of our action as one for “a purely formal acknowledgment,” Pet. 15,

Continued

2. To the extent that the effectiveness of H.R. 4042 is an issue, there are continuing legal consequences to the question whether H.R. 4042 was a duly enacted limitation on appropriations during Fiscal Year 1984. The auditing and account-settlement laws of the United States require that consideration be given, after the end of a fiscal year, to the lawfulness of expenditures under all laws that were in effect during that year. To assure that agency records are available for audits by the Comptroller General, the Comptroller General may require agencies to keep records for a period of not more than ten years. 31 U.S.C. § 3523(c)(1) (1982). The statute of limitations on the settling of accounts by the Comptroller General runs three years from an agency’s receipt of substantially complete accounts for the period covered by the account. *Id.*, § 3526(c)(1); 62 Comp. Gen. 498, 502 (1983). The status of

would imply, that, until the legislators could show that a substantive legal outcome depended upon their votes, their controversy was premature. Rather, it found that the Kansas legislators possessed an adequate interest in the vindication of their votes to obtain a simple determination whether Kansas was to be recorded as having ratified the amendment. Similarly, in order to vindicate their votes to enact it, respondents remain entitled to a declaratory judgment that H.R. 4042 is a law.

Petitioners’ citation (Pet. 12, 15 n.13) of *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982), is not to the contrary. In *NOW v. Idaho*, the Court ordered dismissed as moot a challenge to practices regarding ratification of the Equal Rights Amendment. The Administrator of General Services, who had the statutory duty to record states’ ratification votes, contended successfully in that case that, because the extended date for ratification of the Amendment had expired, “the Amendment has failed of adoption no matter what the resolution of the legal issues presented here, and the Administrator informs us that he will not certify to the Congress that the Amendment has been adopted.” Memorandum for the Administrator of General Services Suggesting Mootness at 3, *NOW v. Idaho*. Here, in contrast, if respondents’ understanding of the pocket veto clause is sustained, petitioners will be obliged to cause H.R. 4042 to be published as a law. Unlike the situation in *NOW v. Idaho*, respondents do not seek a recordation of their futile votes in favor of a defeated measure. Rather, they seek vindication of their votes that succeeded in enacting a law.

H.R. 4042, which was passed as a limitation on Fiscal Year 1984 expenditures, continues to have a bearing on the auditing of expenditures and the settlement of accounts for that year.

We assume that the officials who were responsible for expenditures that may have been subject to H.R. 4042 acted in good faith and would not be subject to any personal responsibility for its violation. We also share the petitioners' assumption, Pet. 16, that the expended funds will not be recouped. Nevertheless, if an audit of expenditures for Fiscal Year 1984, in light of a determination that H.R. 4042 was a law, establishes that officials have breached the Anti-Deficiency Act by expending funds in violation of a statutory restriction, then the head of the agency involved "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351 (1982). If it were necessary to show a continuing legally cognizable interest of the Congress in the status of H.R. 4042 beyond the vindication of its role in the lawmaking process, this statutory obligation to report to the Congress would establish the requisite continuing injury to the Congress from petitioners' failure to preserve and to publish H.R. 4042 as a law.

III.

THE COURT'S RESOLUTION OF THE MERITS STRICTLY ADHERES TO THIS COURT'S POCKET VETO DECISIONS

Although the issue of the scope of the President's pocket veto authority presents an important federal question, the Court should not grant certiorari to review the decision below, because the court of appeals did not decide the issue "in a way in conflict with applicable decisions of this Court." Sup. Ct. R. 17.1(c). To the contrary, the court of appeals properly interpreted the pocket veto clause, guided by this Court's two decisions explicating the pocket veto provision, *The Pocket Veto Case*, 279 U.S. 655 (1929), and *Wright v. United States*, 302 U.S. 583

(1938).¹¹ Reading these cases together and interpreting the pocket veto clause in light of the purposes that the Framers intended it to serve in the lawmaking process, the court correctly concluded that the circumstances of Congress' adjournment between sessions of the Ninety-eighth Congress permitted the President constitutionally to return H.R. 4042 to Congress with his veto. Accordingly, the court held that the President could not pocket veto the bill and that, therefore, when he failed to take any action on the bill, it became a law.

1. The court of appeals properly based its analysis upon "[t]he manifest purpose of the pocket veto clause[, which] has guided application of the clause by the Supreme Court, . . ." App. 23a. The pocket veto provision is one element in the "single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, devised by the Framers for the sharing of legislative power. The constitutional scheme that the Framers adopted provides the President with a "limited and qualified power to nullify proposed legislation by veto." *Id.* at 947. "The President's unilateral veto power, in turn, was limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person." *Id.* at 951.

The pocket veto clause effectuates this balanced arrangement by prescribing the outcomes that obtain when the President neither signs nor vetoes a bill within ten days of its presentment to him. In that event, the bill becomes a law, "unless Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." Art. I, § 7, cl. 2. This provision preserves the constitution-

¹¹ The court also relied upon its prior holding in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (per Tamm, J.), which addressed the President's attempt to pocket veto a bill during Congress' Christmas adjournment. In *Kennedy*, the court of appeals applied this Court's two decisions and held that, because by its adjournment Congress had not prevented the President from returning the bill with his objections, the pocket veto was ineffective and the bill had become law. The Executive did not seek this Court's review of that decision.

al allocation of legislative power by establishing a purely defensive pocket veto mechanism "to safeguard the President's opportunity" to veto bills. *Wright*, 302 U.S. at 596. As this Court has explained,

The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes.

Ibid. Following this Court's admonition "not [to] adopt a construction which would frustrate either of these purposes," *ibid.*, the court of appeals identified the "most important" lesson from *Wright*: "[I]ts rule of construction requires a court to find that the President was truly deprived of his opportunity to exercise his qualified veto power before it may hold that return was 'prevented'; a court that fails in this responsibility ends up sacrificing, without justification, Congress's right to reconsider disapproved legislation," app. 29a, 29a-30a. Thus, relying strictly upon this Court's teaching, the court of appeals based its holding that "H.R. 4042 became law" upon its finding that, "when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented." App. 46a.

2. The analysis that led the court to conclude that the circumstances of the adjournment had not prevented the bill's return strictly followed this Court's guidance in its two prior analyses of the question. The *Wright* case addressed President Roosevelt's attempt to return a vetoed bill to the Senate while the Senate was in a three-day recess, but the House of Representatives was sitting. The Secretary of the Senate had accepted the veto message and had presented it to the Senate when it reconvened. The Court held that the President's return of the bill by delivery to the Secretary of the Senate constituted an effective veto, because,

In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return.

Nor was there any practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill.

302 U.S. at 589-90. As the court of appeals described the *Wright* holding, "Given 'the manifest realities of the situation,' the Court held, return to an agent of the originating house was wholly effective." App. 28a (quoting *Wright*, 302 U.S. at 595). Thus, this Court held in *Wright* that, because the Secretary of the Senate was available to accept veto messages from the President during the Senate's adjournment, the Senate, by its adjournment, had not constitutionally prevented the President from returning the disapproved bill to the Senate. Similarly here, the court of appeals properly held that, because the House had authorized its Clerk to accept veto messages from the President during its adjournments, the President was not prevented, within the meaning of the pocket veto provision, from returning H.R. 4042 with his objections.

3. Petitioners attempt to sidestep the ineluctable import of the *Wright* case by focusing upon the Court's earlier pocket veto adjudication, *The Pocket Veto Case*. In that case the Court sustained President Coolidge's pocket veto of a Senate bill during the five-month adjournment between sessions of the Sixty-ninth Congress, rejecting the argument by beneficiaries of the bill that the pocket veto had been ineffective. The Court concluded that Congress had prevented the President from returning the bill because neither House had provided authorization for an agent to receive vetoed bills from the President during an adjournment. In dictum the Court added its view that "the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the

constitutional mandate." 279 U.S. at 684. Petitioners contend here, as they unsuccessfully argued below, that "*The Pocket Veto Case* establishes that the President is [constitutionally] prevented from returning a bill with a veto message, . . . when Congress has adjourned between sessions." Pet. 25. Petitioners' reliance here upon *The Pocket Veto Case* rests solely upon the fact that in both cases intersession adjournments were involved.

The court of appeals squarely followed this Court's holdings in rejecting petitioners' proffered interpretation of *The Pocket Veto Case*. The Court's analysis in *The Pocket Veto Case* itself undermines petitioners' reliance upon it. The Court there held expressly that the designation of an adjournment is irrelevant to the constitutional question, because "the determinative question" is not what type of adjournment occurs, but solely "whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." 279 U.S. at 680. Thus, it was not the fact that Congress had been in an intersession adjournment that caused the Court in *Pocket Veto* to conclude that the President was prevented from returning the bill to Congress. Rather, it was the fact that the absence, at that time, of a practice of Congress' accepting presidential messages through its agents while it was out of session rendered such a return too vulnerable to uncertainty and delay. *Id.* at 684-85. The Court held only that, given the circumstances of adjournments at that time, the Constitution required "a public return to the House itself." *Id.* at 685.

The fact "[t]hat the Court was not categorically denying the use of agents for delivery of veto messages was made clear in . . . *Wright*. . . ." App. 27a. In the *Wright* case, as here, "[t]he chief, if not the sole, reliance for the argument that the bill could not be returned by the President during the Senate's recess is our decision in the *Pocket Veto Case*." 302 U.S. at 593. The Court in *Wright* rejected this mechanical invocation of the dictum in *The*

Pocket Veto Case and interpreted the decision more flexibly, concluding that "the reasoning of the decision is inapposite to the circumstances of this case," *ibid.*, because "the sort of dangers which the Court envisaged . . . appear to be illusory when there is a mere temporary recess," *id.* at 595. Examining "the manifest realities of the situation" of a brief recess of one House, *ibid.*, the Court in *Wright* found,

In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration. When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over. The prospect that in such a case the public may not be promptly and properly informed of the return of the bill with the President's objections, or that the bill will not be properly safeguarded or duly recorded upon the Journal of the House, or that it will not be subject to reasonably prompt action by the House, is we think wholly chimerical.

Ibid.

As the court of appeals stated, "*Wright* indisputably establishes that mere absence of the originating house does not prevent return if (1) there is an authorized agent to accept delivery of a veto message, and (2) such a procedure would not entail the delay and uncertainty justly feared by the Court in the *Pocket Veto Case*." App. 30a (emphasis in original). Thus, "[t]he principle that . . . runs through *Pocket Veto* and *Wright* is a simple one: whenever Congress adjourns, return of a veto message to a duly authorized officer of the originating house will be effective *only* if, under the circumstances of that type of adjournment, such a procedure would not occasion undue

delay or uncertainty over the returned bill's status." App. 32a (emphasis in original).

Applying this principle, the court of appeals correctly found that the President's return veto of H.R. 4042 to the House of Representatives would have generated neither undue delay nor uncertainty. In the contemporary era, "with Congress almost constantly in session and matters of legislative concern constantly proliferating," *Gravel v. United States*, 408 U.S. 606, 616 (1972), intersession "adjournments do not differ in any practical respect from the intrasession adjournments at issue in *Wright*," app. 33a. First, "intersession adjournments of the modern era" are far shorter than "the five or six month intersession adjournments typical at the time of the *Pocket Veto Case*." App. 33a. Second, "Uncertainty no more characterizes return during adjournment than does delay. . . . [T]he organization of each house of Congress remains unchanged, and their respective staffs continue to function uninterrupted. More importantly, neither house any longer lacks an authorized procedure for acceptance of veto messages during adjournment." App. 35a-36a (footnote omitted). Thus, under this Court's decisions, the court of appeals properly found that "when Congress adjourned its first session *sine die* on the day it presented H.R. 4042 to the President, return of that bill to the originating house was not prevented. . . . [T]herefore, . . . H.R. 4042 became law, . . ." App. 46a.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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<i>Michael D. Barnes, et al.</i>	

JANUARY 1986.

APPENDIX H

APPENDIX H

1 U.S.C. § 106a (Supp. II 1984). Promulgation of laws:

Whenever a bill, order, resolution, or vote of the Senate and House of Representatives, having been approved by the President, or not having been returned by him with his objections, becomes a law or takes effect, it shall forthwith be received by the Archivist of the United States from the President; and whenever a bill, order, resolution, or vote is returned by the President with his objections, and, on being reconsidered, is agreed to be passed, and is approved by two-thirds of both Houses of Congress, and thereby becomes a law or takes effect, it shall be received by the Archivist of the United States from the President of the Senate, or Speaker of the House of Representatives in whichsoever House it shall last have been so approved, and he shall carefully preserve the originals.

1 U.S.C. § 112 (Supp. II 1984). Statutes at Large; contents; admissibility in evidence:

The Archivist of the United States shall cause to be compiled, edited, indexed, and published, the United States Statutes at Large, which shall contain all the laws and concurrent resolutions enacted during each regular session of Congress; all proclamations by the President in the numbered series issued since the date of the adjournment of the regular session of Congress next preceding; and also any amendments to the Constitution of the United States proposed or ratified pursuant to article V thereof since that date, together with the certificate of the Archivist of the United States issued in compliance

with the provision contained in section 106b of this title. In the event of an extra session of Congress, the Archivist of the United States shall cause all the laws and concurrent resolutions enacted during said extra session to be consolidated with, and published as part of, the contents of the volume for the next regular session. The United States Statutes at Large shall be legal evidence of laws, concurrent resolutions, treaties, international agreements other than treaties, proclamations by the President, and proposed or ratified amendments to the Constitution of the United States therein contained, in all the courts of the United States, the several States, and the Territories and insular possessions of the United States.

1 U.S.C. § 113 (Supp. II 1984). "Little and Brown's" edition of laws and treaties; slip laws; Treaties and Other International Acts Series; admissibility in evidence:

The edition of the laws and treaties of the United States, published by Little and Brown, and the publications in slip or pamphlet form of the laws of the United States issued under the authority of the Archivist of the United States, and the Treaties and Other International Acts Series issued under the authority of the Secretary of State shall be competent evidence of the several public and private Acts of Congress, and of the treaties, international agreements other than treaties, and proclamations by the President of such treaties and international agreements other than treaties, as the case may be, therein contained, in all the courts of law and equity and of maritime jurisdiction, and in all the tribunals and public offices of the United States, and of the several States, without any further proof or authentication thereof.

44 U.S.C. § 709 (1982). Public and private laws, postal conventions, and treaties:

The Public Printer shall print in slip form copies of public and private laws, postal conventions, and treaties, to be charged to the congressional allotment for printing

and binding. The Joint Committee on Printing shall control the number and distribution of copies.

44 U.S.C.A. § 710 (West Supp. 1985). Copies of Acts furnished to Public Printer:

The Archivist of the United States shall furnish to the Public Printer a copy of every Act and joint resolution, as soon as possible after its approval by the President, or after it has become a law under the Constitution without his approval.

44 U.S.C.A. § 711 (West Supp. 1985). Printing Acts, joint resolutions, and treaties:

The Public Printer, on receiving from the Archivist of the United States a copy of an Act or joint resolution, or from the Secretary of State, a copy of a treaty, shall print an accurate copy and transmit it in duplicate to the Archivist of the United States or to the Secretary of State, as the case may be, for revision. On the return of one of the revised duplicates, he shall make the marked corrections and print the number specified by section 709 of this title.



JAN 21 1986

JOSEPH F. SPANIOL,
CLERK5
No. 85-781

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF
THE UNITED STATES, AND RONALD GEISLER,
EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition, we demonstrated that the court of appeals erroneously decided significant constitutional questions that have a direct bearing on the relationship between the branches of the federal government and on the process by which bills become law. We are rather surprised that respondents, the United States Senate and the Speaker and other members of the House of Representatives, argue so eagerly that these fundamental questions are not worthy of review by this Court and go to such lengths to convince the Court that this dispute about a long-expired bill has not become moot. They advance, however, no substantial reason why the Court should not grant certiorari in this case.

1. As we explained in the petition (at 11-16), this case became moot when H.R. 4042, 98th Cong., 1st Sess. (1983), expired, and the court of appeals clearly erred in refusing to

vacate its judgment on that basis. In their efforts to find some collateral consequence that might keep the case alive, respondents would transform this action from one seeking to vindicate their constitutional role in the legislative process to one “‘merely * * * assert[ing] an abstract interest in bill publication’” (Pet. 11)—precisely the position that they disavowed below. While respondents now contend that the mere refusal to publish H.R. 4042 nullifies the effectiveness of their votes in favor of the bill (J. Br. in Opp. 3; H.R. Br. in Opp. 17-18),¹ they plainly were correct in advancing the opposite position below (Pet. 14 (emphasis in petition; footnote omitted)): “[v]indication of the effectiveness of [respondents’] votes require[d] a ruling that the law take effect when, by its own terms, its *substantive legal consequences* come into play.’”

Petitioners’ refusal to publish H.R. 4042 as the dead letter that it now undeniably is has no effect whatsoever on respondents’ lawmaking powers. The bill publication and preservation statutes do not “implement the constitutional design for the legislative process,” as respondents baldly assert (J. Br. in Opp. 4). To the contrary, the Constitution nowhere requires that a bill be published in the Statutes at Large in order to have the force and effect of law. Thus, whether or not H.R. 4042 was or ever is published has nothing to do with its legal status. If the President was constitutionally required to exercise a return veto, then the bill became law on the tenth day (Sundays excepted) following its presentment, notwithstanding petitioners’ failure to publish it. By the same token, if no return veto was required, the bill was not a law, and it would not have been one even if

¹ “J. Br. in Opp.” refers to the joint brief filed by Michael D. Barnes, et al., and the United States Senate. “H.R. Br. in Opp.” refers to the brief filed by the Speaker and Bipartisan Leadership Group of the House of Representatives.

petitioners had published it. And either way, H.R. 4042 does not now and never will have any legal effect.²

At bottom, all that respondents now seek is, as they admit (J. Br. in Opp. 10), an acknowledgement that “they have enacted a law.” Their desire for such an opinion, merely “advising what the law would be upon a hypothetical state of facts” (*Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (citation omitted)), however, is utterly insufficient to establish a continuing concrete and substantial controversy within the meaning of Article III. As we explained in our petition (at 15 n.13), the Court decided in *National Organization for Women, Inc. (NOW) v. Idaho*, 459 U.S. 809 (1982), that a State’s attempt to require the government to publish an announcement that the State had rescinded its ratification of the Equal Rights Amendment became moot when the ratification period expired. That decision is equally applicable here, and it compels the conclusion that this case is no longer live and justiciable.³

²For these reasons, respondents err in contending (H.R. Br. in Opp. 17) that the mootness issue “is merely a variant on” the standing question. Our point is that even if respondents did have standing to sue in federal court to vindicate their “constitutional role[] in the legislative process” (J. Br. in Opp. 3), the publication of H.R. 4042 pursuant to 1 U.S.C. (Supp. II) 112 could not now provide that vindication.

³Respondents attempt (J. Br. in Opp. 13 n.10; H.R. Br. in Opp. 17 n.20) to distinguish *NOW* on the wholly insubstantial basis that Idaho there sought an acknowledgement that it voted against a failed measure, while respondents here seek recognition that they voted in favor of a successful measure. This distinction might have made a difference if H.R. 4042 were still capable of being put into effect. As it stands, however, the bill can enjoy no greater legal status than could the unsuccessful constitutional amendment at issue in *NOW*. The only question in both cases is whether formal publication by the responsible government officials of the position taken by a party is sufficient, in the absence of continuing legal consequences, to keep a case alive. *Coleman v. Miller*, 307 U.S. 433 (1939), on which respondents rely (J. Br. in Opp. 12-13 n.10), is not to the contrary. There, the constitutional amendment in issue was still pending before the states (see 307 U.S. at 451-454), and whether Kansas had ratified it therefore was of continuing importance.

By arguing that the case is not moot, respondents ask this Court "to close [its] eyes to reality." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (plurality opinion). The reality is that this action concerned whether H.R. 4042 had become a law of the United States, and the answer to that question simply does not matter any more.⁴ The case is moot.

2. a. Representative Barnes, et al., and the Senate contend (J. Br. in Opp. 2-7) that respondents' standing in this case rests on 1 U.S.C. (Supp. II) 112, the statute requiring the Archivist of the United States to publish enacted laws in the Statutes at Large. They are, respondents contend (J. Br. in Opp. 6), the "explicit beneficiaries of the requirement that enacted laws be published, [and] are 'within the zone of interests' " protected by the statute. In making this argument, which obviously is contrived in an effort to avoid mootness, respondents for the most part effectively abandon the court of appeals' analysis of standing. That analysis rested on the court of appeals' acceptance of respondents' claim that they suffered "a specific and concrete harm to [their] powers under Article I, section 7" of the Constitution (Pet. App. 15a). The court of appeals never addressed respondents' standing to enforce the statutory publication requirement; and as we explained in our petition (at 14 n.12), if that had been the basis for respondents' standing there would have been no occasion to address whether the Constitution, by establishing the procedure for enacting laws, confers standing on them.

⁴Respondents' own reasoning makes this clear. They state that publication is important so that "any party may take notice of [the statute] and * * * initiate legal action, if necessary, to secure its benefits" (J. Br. in Opp. 6 n.4). Where, however, the statute has expired before even being published, leaving behind no vested rights (as is indisputably true of H.R. 4042), notice serves no purpose because no benefits are available and no one need alter his conduct in any manner.

Respondents' contention that they suffer a distinct injury giving them standing to enforce Section 112 does not withstand even cursory analysis. As we have just explained, failure to publish a bill does not nullify the effectiveness of respondents' votes, because a bill is just as much a law whether it is published in the Statutes at Large or not. Respondents argue (J. Br. in Opp. 6) that the publication statutes were enacted for their special benefit, relying on an act passed by the First Congress entitling each member of Congress to a printed copy of each bill that becomes law. Respondents neglect to point out, however, that this "obsolete" and "archaic" entitlement was repealed more than 30 years ago. S. Rep. 1714, 82d Cong., 2d Sess. 1, 2 (1952); Act of July 10, 1952, ch. 632, §§ 2, 7, 66 Stat. 540, 541. Moreover, if all that respondents seek is a copy of H.R. 4042, they can easily obtain one. They have not, however, been deprived of anything printed in the Statutes at Large. Respondents' contention that H.R. 4042 should have been published in the Statutes at Large, then, is based ultimately on the identical "generalized interest" (*Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 217 (1974)) that all citizens have in the availability of a convenient record of the laws of the United States. Nothing in the statutes on which respondents rely grants them a distinct, enforceable proprietary interest in the laws that they have passed.

b. The Speaker and Bipartisan Leadership of the House argue (H.R. Br. in Opp. 13-17) that this case is an inappropriate one in which to address the standing of Congress under Article I, Section 7 of the Constitution because the issue was not adequately considered below. The issue, however, was fully briefed by the parties on rehearing, the appropriate time for it to be considered in light of the fact that all of the respondents had standing under binding circuit precedent (see Pet. App. 9a). Moreover, the question was exhaustively considered by both the majority and

dissenting judges in the court of appeals, and it has been the subject of a long line of cases within the circuit (see Pet. 17 n.16; Pet. App. 8a-18a, 47a-118a). In these circumstances, the issue is in an appropriate posture for review by this Court.

Respondents also contend (H.R. Br. in Opp. 16-17) that review is unwarranted because this case does not involve the more common situation of an individual member of Congress suing without the support of the Houses themselves. Plainly, however, the presence of the United States Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives as intervenors only increases the importance of the action and the need for this Court's review.⁵

3. Finally, respondents contend (J. Br. in Opp. 14-20; H.R. Br. in Opp. 9-13) that the court of appeals' holding that the Pocket Veto Clause did not apply to the nine-week intersession adjournment in this case is compelled by this Court's decision in *Wright v. United States*, 302 U.S. 583

⁵Respondents also snipe at various parts of Judge Bork's dissenting opinion, including portions that are not germane to the standing argument that we made in the petition (see, e.g., J. Br. in Opp. 9-10; H.R. Br. in Opp. 15-16). Although it is unnecessary here to explore the standing issue at length, we note that respondents do not address the argument made in our petition (at 20-22) that this action is indistinguishable from one seeking the enforcement of H.R. 4042 and that their extensive reliance (e.g., J. Br. in Opp. 9; H.R. Br. in Opp. 13, 14) on *Coleman v. Miller*, *supra*, is misplaced. There, a closely divided Court held that it had jurisdiction to review the decision of a state court that, unconstrained by Article III, had decided federal constitutional questions in an action brought by state legislators. The Court concluded (307 U.S. at 446) that the interest of the legislators, which was "treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision." The case does not stand for the proposition that legislators have standing to bring an action in federal court on the basis of an asserted injury to their lawmaking functions.

(1958). Their argument that *Wright* settles the matter is without substance: the Court there ruled in favor of the government's contention that the President had effectively *returned* a veto message to the Senate. The decision cannot reasonably be read as a definitive limitation on the President's authority under the Pocket Veto Clause.

In fact, this Court has never held a pocket veto ineffective. To the contrary, in the only case where it actually decided the issue, *The Pocket Veto Case*, 279 U.S. 655 (1929), the Court concluded that a bill had not become law on the basis of the Pocket Veto Clause.⁶ We demonstrated in our petition (at 22-25) that the court of appeals' decision conflicts with the rule established by this Court in *The Pocket Veto Case*. Even if the question is an open one, however, it surely warrants final resolution by this Court rather than by the court of appeals. We do not understand why respondents, as members of a coordinate branch of government, would argue otherwise.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted. As suggested in the petition, the Court may wish to consider summarily vacating the decision below and remanding with directions to dismiss the action as moot.

Respectfully submitted.

CHARLES FRIED
Solicitor General

JANUARY 1986

⁶Respondents' argument (H.R. Br. in Opp. 10) that *Wright* overruled *The Pocket Veto Case* is plainly wrong for the reasons stated in our petition (at 26-27).

MAY 18 1966

JOSEPH E. DANIEL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE
UNITED STATES, AND RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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* The opinions of the court of appeals and of the district court are printed in the appendix to the petition for a writ of certiorari and have not have been reproduced here.

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84-5155

GENERAL DOCKET

84-5155

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

APPEAL FROM THE DISTRICT COURT

See 84-5013
84-5014

Michael D. Barnes, individually/
member; U.S. House of Representa-
tives, et al., and

United States Senate, et al.,

Appellants

v.

Rav Kline
~~Gerald P. Barnes~~, individually and
in his capacity as Administrator,
General Services Administration, et al.

Popular Name:

Number of Case/Order Below: CA 84-00020

Case Type: CV.US.

JS-34: Yes ☒ No ☐

Judge Below: Jackson (9058)

Date of Judg./Order: 03-12-84

USDC Offense/Nature of Suit Code: 2890

Date Docketed: 03-16-84

Date Filed in Dist. Court: 01-04-84

Notice of Appeal Filed: 03-14-84

U.S. Mag:

☐ Direct

☐ Indirect

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1-010

GENERAL DOCKET

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

84-3155

84-3155

DATE

FILINGS — PROCEEDINGS

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84-5155

REMARK

84-5155

DATE	FILINGS — PROCEEDINGS
(B)03-16-84 (B)03-16-84	Copy of notice of appeal and docket entries from Clerk, DC (n-5) Docketing statements were mailed to counsel for appellants (Mailed to Esqs. Ross Davidson & Ratner)
(J)03-16-84 (J)03-16-84 (V)03-23-84	4-Appellants' joint motion to expedite (p-16) 4-Appellees' response to appellants motion to expedite (m-16) Per curiam order that the motion to expedite is denied; and that the Clerk is directed to schedule this case for oral argument during this Court's September 1984 sitting period. The following briefing schedule shall apply: Appellants' brief and appendix - 05/04/84; Intervenor's brief - 05/14/84; Appellees' brief 06/18/84; Appellants' reply brief, - 07/06/84; Wright and Edwards, CJs and SCJ Bazelon (Circuit Judge Wright did not participate in this order)
(J)03-23-84 (J)03-23-84 (J)04-03-84 (V)04-10-84	4-Appellants' (Michael D. Barnes, et al.) docketing statement (m-20) 4-Appellant's (U.S. Senate) docketing statement (m-21) 15-Appellants' suggestion for rehearing en banc of 03-23-84 order (m-30) Per curiam order that reconsideration is granted and the Clerk is directed to expediate this case and schedule it for oral argument during the May-June calendar; and that the following briefing schedule shall apply: Appellants' brief and appendix shall be personally served and filed by the close of business - 04/18/84; Appellants' answering brief shall be personally served and filed by the close of business - 05/18/84; Appellants' reply brief shall be personally served and filed by the close of business - 05/28/84. No enlargement of the foregoing briefing schedule will be granted absent extraordinary and compelling reasons; Wright (who did not participate) and Edwards, CJs and SCJ Bazelon
(J)04-18-84 (J)04-18-84 (J)04-18-84 (J)05-18-84 (V)05-22-84	15-Appellants' (Speaker of the House, et al.) brief (p-18) 15-Appellants' (Senate) brief (p-18) 7-Joint appendix (p-18) 15-Appellees' brief (p-18) (m-18) Clerk's order, sua sponte, that the following times are allotted for oral argument Appellants - 15 minutes; Appellees - 15 minutes. Only one counsel per side will be allowed to argue
(J)05-29-84 (J)05-29-84 (V)06-04-84 (J)07-17-84 (V)07-31-84	15-Appellants' (Speaker of the House, et al.) brief (p-25) 15-Appellants' (Senate) brief (p-29) ARGUED before CJ Robinson, Bork, CJ and SCJ McGowan 4-Appellants' motion for leave to file supplemental brief (p-17) Per curiam order that the motion for leave to file supplemental brief is granted and the Clerk is directed to file appellants' lodged supplemental brief and to enter same on the docket; CJ Robinson, Bork, CJ and SCJ McGowan
(V)07-31-84 (D)08-29-84	15-Appellants' supplemental brief (p-17) Judgment by this Court that the judgment of the District Court granting summary judgment to appellees is hereby reversed and the case remanded to the District Court with instructions that summary judgment be entered for appellants and appellant-intervenors. Bork, CJ, dissents on the ground that neither appellants nor appellant-intervenors have standing to bring this action. The mandate herein shall issue forthwith. Opinion of the court to follow.
(I)08-29-84	MANDATE ISSUED.
(J)08-29-84	4-Letter from counsel for appellants advising of additional authorities pursuant to FRAP 28(j) (m-28)
(J)09-28-84	15-Appellees' petition for rehearing and suggestion for rehearing en banc (m-28)

SEE NEXT PAGE

81-5155

GENERAL DOCKET

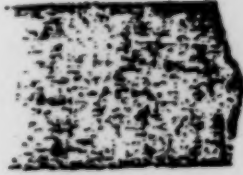
81-5155

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

81-5155

84-5155

DATE	FILINGS — PROCEEDINGS
(V)10-09-84	Per curiam order that appellees are granted leave to file a supplemental petition for rehearing and suggestion for rehearing en banc no later than 21 days after issuance of the Opinion of the Court; CJ Robinson, Bork, CJ and SCJ McGowan.
(D)04-12-85	Opinion for the Court filed by Senior Circuit Judge McGowan.
(D)04-12-85	Separate dissenting opinion filed by Circuit Judge Bork.
(D)04-12-85	Per Curiam order, sua sponte, that the Opinion for the Court filed by Senior Circuit Judge McGowan on April 12, 1985 and the Separate Dissenting Opinion filed by Circuit Judge Bork be, and hereby are amended. (SEE ORDER FOR DETAILS).
(R)04-25-85	4-Appellees' motion to extend time to file a supplemental petition for rehearing with suggestion for rehearing en banc (m-25) [1]
(E)05-03-85	Per curiam order that appellees' motion to extend time to file a supplemental petition for rehearing with suggestion for rehearing en banc is granted, and the time for filing appellees' supplemental petition for rehearing with suggestion for rehearing en banc is extended to and including May 17, 1985. CJ Robinson, Bork, CJ, and McGowan, SCJ.
(R)05-17-85	25-Appellees' supplemental petition for rehearing with suggestion for rehearing en banc (m-17) [1]
(E)06-04-85	Per curiam order that appellants are directed to file with the Court within two weeks from the date of this order briefs in response to appellee-petitioners' suggestion, in the Supplemental Petition for Rehearing with Suggestion for Rehearing En Banc filed by appellees on May 17, 1985, that this case is now moot and the judgment and opinion should accordingly be vacated. (See order for details.) Appellee-petitioners may file a supplemental brief with the Court within two weeks of the date of issuance of this order, addressing the issues specified in this order. The parties are directed to submit 25 copies of each brief filed. CJ Robinson, Bork, CJ, and McGowan.
(R)06-18-85	25-Appellees' (DOJ) supplemental brief (m-18) [1]
(R)06-18-85	25-Appellants' (Senate) supplemental brief (p-18) [1]
(R)06-18-85	25-Appellants' (Speaker & Bipartisan Leadership Group) supplemental brief (m-18) [1]
(T)08-07-85	Per Curiam order denying appellees' petition for rehearing; CJ Robinson, Bork, CJ (who would grant rehearing) and McGowan, SCJ
(T)08-07-85	Per Curiam order, en banc, denying appellees' suggestion for rehearing en banc; CJ Robinson; Wright, Tamm, Wald, Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, CJs (Circuit Judges Bork, Scalia and Starr would grant the suggestion) Notice from Clerk, Supreme Court that a petition for writ of certiorari was filed on November 5, 1985 in SC No. 85-781.
(E)11-18-85	Oral Argument Transcript
(E)12-30-85	TRANSCRIPT OF ORAL ARGUMENT
(J)01-15-86	Certified copy of order from Clerk, Supreme Court granting the petition for writ of certiorari in SC No. 85-781 on March 3, 1986 [1]
(H)03-07-86	Per curiam order that the mandate of the Court issued on August 29, 1984 be recalled. The Clerk of the District Court is requested to return the mandate as promptly as the business of his office permits. CJ Robinson, Bork, CJ, and McGowan, SCJ.
(E)04-03-86	



DATE	FILINGS — PROCEEDINGS
(T)04-07-86	4-Letter from Clerk, SC requesting certification and transmittal of original record [1]
(T)04-18-86	MANDATE RETURNED [1]
(E)04-22-86	Clerk's order directing the Clerk of the District Court to compile and certify to this Court the record before the District Court, and do so as promptly as the business of his office permits.
(T)04-21-86	Letter from #1 to Clerk, SC, transmitting a partial record
(T)04-23-86	Receipt dated 4/23/86 from Clerk, SC acknowledging receipt for partial record
(T)04-29-86	CERTIFIED ORIGINAL RECORD (2 volumes); 2 volumes of transcript under separate cover [1]

84-5014

GENERAL DOCKET

84-5014

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

APPEAL FROM THE DISTRICT COURT

84-5135
Ser 84-5013

Michael D. Barnes, individually/
member; U.S. House of Representa-
tives, et al.,

Appellants

v.

Gerald P. Carmen, individually and
in his capacity as Administrator,
General Services Administration, et al.

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Popular Name:

Number of Case/Order Below: C.A. 84-00020

Case Type: CV.US

IS-34:

Yes ☒No ☐

Judge Below: Jackson (9058)

Date of Judg./Order: 01-09-84

USDC Offense/Nature of Suit Code:

Date Docketed: 01-11-84

Date Filed in Dist. Court: 01-04-84

Notice of Appeal Filed: 01-11-84

U.S. Mag:

☐ Direct☐ Indirect

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84-5014

REMARKS

84-5014

DATE	FILINGS — PROCEEDINGS
(G)01-11-84 (G)01-11-84	Copy of Notice of Appeal and Docket Entries from Clerk, U.S. District Court(n-4) Certified Original Record (1) volume and (1) volume of transcript under separate cover (n-4)
(G)01-11-84 (G)01-11-84 (G)01-11-84 (G)01-11-84 (G)01-11-84	Notice from Clerk, U.S. District Court that fee was paid on January 11, 1984 4-Appellants' emergency motion for expedited appeal and decision (p-11) 4-Appellants' brief (p-11) 4-Appellants' appendix (p-11)
(G)01-11-84 (V)01-11-84	Docketing statement mailed to counsel for appellants Clerk's order that a response to the papers filed herein on January 11, 1984 be served and filed no later than 12:00 p.m. Friday, January 13, 1984
(V)01-13-84	Per curiam order that appellants/petitioners' emergency motions for expedited appeal and stay are denied. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); and that the petition for writ of mandamus is denied; Tamm (who did not participate), Wilkey and Scalia, CJs
(J)01-13-84 (J)01-13-84	4-Appellees' motion to dismiss (m-13) 4-Appellees' opposition to motion for expedited appeal or for issuance of a writ of mandamus (m-13)
(J)01-23-84 (V)01-30-84	4-Appellants' motion to dismiss appeal (m-18) Per curiam order that appellants' motion to dismiss appeal is granted and the above appeal is hereby dismissed. The Clerk is directed to send a certified copy of this order to the District Court; Tamm (who did not participate), Wilkey and Scalia, CJs
(V)01-30-84 (J)02-03-84	Certified copy of above order sent to District Court Receipt dated 01-31-84 from District Court for certified original record 1 vol.; 1 vol. of transcript under 1 separate cover

CC 1-31-84

84-5013

GENERAL DOCKET

84-5013

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF HABEAS CORPUS

84-5155

See 84-5014

In re:

Michael D. Barnes, individually
and in his capacity as a member of
the United States House of Repre-
sentatives, et al.,

Petitioners

COUNSEL APPELLANT/PETITIONER

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US

Popular Name:

Number of Case/Order Below: CV. 84-00020

Case Type: OP.MAND.

JS-34: Yes ☒ No ☐

Judge Below:

Date of Judg./Order:

USDC Offense/Nature of Suit Code:

Date Docketed: 01-11-84

Date Filed in Dist. Court:

Notice of Appeal Filed:

U.S. Mag: ☐ Direct☐ Indirect

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84-5013

REMARKS

84-5013

DATE	FILINGS — PROCEEDINGS
(G)01-11-84	4-Petitioners' petition for writ of mandamus (p-11)
(G)01-11-84	4-Petitioners' emergency motion for expedited appeal and decision (p-11)
(G)01-11-84	4-Petitioners' exhibits to petition for writ of mandamus (p-11)
(G)01-11-84	Docketing statement given to counsel for petitioners'
(V)01-11-84	Clerk's order that a response to the papers filed herein on January 11, 1984 be served and filed no later than 12:00 p.m., Friday, January 13, 1984
(V)01-13-84	Per curiam order that appellants/petitioners' emergency motions for expedited appeal and stay are denied. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921 (D.C. Cir. 1958); and that the petition for writ of mandamus is denied; Tamm (who did not participate), Wilkey and Scalia, CJs
(J)01-13-84	4-Respondents' motion to dismiss (m-13)
(J)01-13-84	4-Respondents' opposition to motion for expedited appeal or for issuance of writ of mandamus (m-13)

000000	YR.	NUMBER	MO.	DAY	YR.	ISS. NO.	EXP. DATE	MAG. NO.	DEM.	YR.	NUMBER
0090	1	84-0020	01	04	84	2	890	1	11001 N	84	0020

BARNES, ET AL V CARMEN, ET AL

CAUSE: 1 USC 106(A) ? REVIEW AGENCY ACTION

31 PLA
BRUCE VENTO
IND/HEM. U.S. HOUSE OF REPS.

32 PLA
TED WLISS
IND/MEM. U.S. HOUSE OF REPS.

33 PLA
HOWARD WILPE
IND/MEM. U.S. HOUSE OF REPS.

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HOUSE OF REPRESENTATIVES

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Washington, D. C. 20515
(202) 225-9700

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UNITED STATES DISTRICT COURT DOCKET

[4]

DC 111 (Rev. 7/85)

DATE	NR.	PROCEEDINGS
<u>1984</u>		
Jan 4	1	COMPLAINT; appearance; Exhibits A-E. (ml)
Jan 4	2	MOTION by pliffs. for Preliminary Injunction; affirmation in support; statement of Points & Authorities.
Jan 4	3	MOTION by pliffs. to shorten time for filing of opposition to motion for Preliminary Injunction and to shorten time for oral hearing on Preliminary Injunction; declaration of Michael Ratner. (ml)
Jan 4		SUMMONS (6) issued. (ml)
Jan 4	4	AFFIDAVIT OF SERVICE upon Gerald P. Carmen, Ronald Geisler, the U. S. Attorney and the U. S. Attorney General on 1-4-84. (ml)
Jan 5	5	OPPOSITION by defts. to pliffs' motion to shorten time.
Jan 9	6	REPLY by pliffs. to defts' opposition to pliffs' motion to shorten time. (ml)
Jan 11	7	TRANSCRIPT OF PROCEEDINGS taken on Jan. 9, 1984; Rep: P. Merana. pp. 1-22. b1
Jan 11	8	NOTICE OF APPEAL by Pliffs. from order entered Jan. 9, 1984; copy of notice mailed to Judith Ledbetter, Dept. of Justice; \$65.00 USCA and \$5.00 USDC fee paid and credited to U.S. Treasury.
Jan 11		Copy of Notice of Appeal and docket entries transmitted to USCA; USCA# 84-5014.
Jan 11		RECORD ON APPEAL transmitted to USCA; receipt acknowledged 1-11-84.
Jan 27	9	MOTION by the United States Senate to Intervene; attachment; no fee-government; Exhibits (Complaint; Motion for Summary Judgment); Appearance: Michael Davidson, 642 Senate Office Bldg., Washington, D. C. 20510; (202) 224-4435. (ml)
Jan 30	10	MOTION by defts. for summary judgment; statement of material facts; declaration of Ronald R. Geisler; P&A's; Appendix I. (ml)
Jan 31	11	CERTIFIED Copy of Order from USCA dated 1-30-84; Ordered that appellants' motion to dismiss appeal is granted and the above appeal is hereby dismissed. (ml)
Feb 1		TRANSMITTAL LETTER from USCA returning 1 volume original record and 1 volume of transcript under 1 separate cover. (ml)
Feb 2	12	ORDER filed 2-1-84 granting motion of U. S. Senate to Intervene as party pltf. (N) JACKSON, J. (ml)
Feb 2	13	COMPLAINT by intervenor for declaratory relief. (ml)
Feb 2	14	MOTION by intervenor for summary judgment; statement of material facts; memorandum in support. (ml)
Feb 2	15	MOTION by pliffs. and intervenor pltf. for extension of time to file their final submissions. (ml)
Feb 8	16	ORDER filed 2-6-84 granting joint motion of pltf. and intervenor for extension of time, and extending time to 2-8-84 to file their final submissions. (N) JACKSON, J. (ml)

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF		DEFENDANT		DOCKET NO. <u>84-0020</u>
MICHAEL D. BARNES, et al.		GERALD P. CARMEN, et al.		PAGE <u>1</u> OF <u> </u> PAGES
DATE	NR.	PROCEEDINGS		
1984				
'eb 08	17	MOTION by pltf. for summary judgment; statement of material facts; Michael D. Barnes. (fs)		
'eb 08	18	MEMORANDUM by pltf. in opposition to motion of deft. for summary judgment, in support of motion of pltf's. for summary judgment; declaration of Michael Ratner; Table of contents and Table of authorities. (fs)		
'eb 08	19	POINTS AND AUTHORITIES by deft. in opposition to motion of intervenor for summary judgment. (fs)		
'eb 08	20	OPPOSITION of intervenor to motion of defts. for summary judgment; table of contents; table of authorities; statement of genuine issue. (fs)		
Feb 17	21	OPPOSITION by defts. to pltf's' motion for summary judgment. (ml)		
Feb 17	22	MOTION by the Speaker and the bipartisan elected leadership of the United States House of Representatives to intervene; no fee- government; memorandum of P&A's; table of cases and authorities; Exhibit (Complaint; Motion for summary judgment) (Appearance: Michael L. Murray, U.S. House of Representatives, The Capitol, H-105, Washington, D. C. 20515, (202) 225-9700) (ml)		
Feb 22		MOTION of House of Representatives to intervene as party pltf. heard and granted; trial on the merits heard and taken under advisement. (Rep. P. Merana) JACKSON, J. (ml)		
Feb 22	23	COMPLAINT by intervenor-pltf's. the House of Representatives. (ml)		
Feb 22	24	MOTION by intervenor-pltf's. the Speaker and elected bipartisan leadership of the U.S. House of Representatives for summary judgment; memorandum of P&A's; table of cases and authorities; statement of material facts. (ml)		
Mar 12	25	MEMORANDUM & ORDER filed 3-9-84 denying pltf's and pltf-intervenor's motion for summary judgment and preliminary and permanent relief and granting deft's motion for summary judgment and dismissing complaint with prejudice. (N) JACKSON, J. (ml)		
Mar 14	26	NOTICE OF APPEAL by pltf's. and intervenor-pltf's. from order entered 3-12-84; no fee - government; copy of notice sent to: Judith F. Ledbetter. (ml)		
Mar 15		COPY of Notice of Appeal and docket entries transmitted to USCA# <u> </u>		

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Number

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY
AS A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 401 CANNON HOUSE OFFICE BUILDING,
WASHINGTON, D.C. 20515, (202) 225-5341;

GARY ACKERMAN, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1725 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-2601;

HOWARD BERMAN, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1022 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-4695;

JOHN CONYERS, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 2313 RAYBURN HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515 (202) 225-5126;

RONALD V. DELLUMS, INDIVIDUALLY AND IN HIS CAPACITY
AS A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 2136 RAYBURN HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-2661;

MERVYN DYMALLY, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1717 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-5425;

DENNIS ECKART, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1221 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 255-6331;

ROBERT W. EDGAR, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 2352 RAYBURN HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-2011;

VIC FAZIO, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1421 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-5716;

ED FEIGHAN, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1223 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-5731;

BARNEY FRANK, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1609 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515 (202) 225-5931;

ROBERT GARCIA, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 223 CANNON HOUSE OFFICE BUILDING,
WASHINGTON, D.C. 20515, (202) 225-4361;

SAMUEL GEJDENSON, INDIVIDUALLY AND IN HIS CAPACITY
AS A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1008 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-2076;

PETER KOSTMEYER, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 123 CANNON HOUSE OFFICE BUILDING,
WASHINGTON, D.C. 20515, (202) 225-4276;

MICKEY LELAND, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 419 CANNON HOUSE OFFICE BUILDING,
WASHINGTON, D.C. 20515, (202) 225-3816;

MEL LEVINE, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 502 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-6451;

ROBERT MATSUI, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 231 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-7163;

MATT McHUGH, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2335 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-6335;

EDWARD J MARKEY, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 205 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-2836;

BARBARA A. MIKULSKI, INDIVIDUALLY AND IN HER CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 407 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-4016;

GEORGE MILLER, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2422 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-2095;

BRUCE MORRISON, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 437 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-3661;

MARY ROSE OAKAR, INDIVIDUALLY AND IN HER CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2436 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-5871;

JAMES L. OBERSTAR, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2351 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-6211;

RICHARD L. OTTINGER, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2241 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-6506;

PATRICIA SCHROEDER, INDIVIDUALLY AND IN HER CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2410 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-4431;

PAUL SIMON, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 343 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-5201;

FERDINAND ST. GERMAIN, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2108 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-4911;

GERRY STUDDS, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1501 LONGWORTH HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-3111;

ROBERT TORRICELLI, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 317 CANNON HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-5661;

BRUCE VENTO, INDIVIDUALLY AND IN HIS CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 2433 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C. 20515, (202) 225-6631;

TED WEISS, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 2442 RAYBURN HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-5635;

HOWARD WOLPE, INDIVIDUALLY AND IN HIS CAPACITY AS A
MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, 1527 LONGWORTH HOUSE OFFICE
BUILDING, WASHINGTON, D.C. 20515, (202) 225-5011;

PLAINTIFFS,

-AGAINST-

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY
AS ADMINISTRATOR, GENERAL SERVICES ADMINISTRATOR,
18TH AND F STREET, N.W., WASHINGTON, D.C. 20006;
AND RONALD GEISLER, INDIVIDUALLY AND IN HIS CAPACITY
AS THE EXECUTIVE CLERK OF THE WHITE HOUSE, 1600
PENNSYLVANIA AVENUE N.W., WASHINGTON D.C. 20006;
DEFENDANTS.

Complaint for Declaratory and Mandamus/or Injunctive Relief

I

INTRODUCTORY STATEMENT

1. This action seeks a declaration that H.R. 4042, which mandates certain certification requirements as a pre-condition for military aid to El Salvador, has become law. H.R. 4042 was passed unanimously by the House on September 30, 1983, and by the Senate on November 17, 1983. Pursuant to Article I, Section 7, clause 2 of the United States Constitution, Congress sent H.R. 4042 to the President on November 18, 1983. The President held the bill longer than ten days and did not return it to Congress. He issued a statement in which he claimed to exercise a "pocket veto."

2. A "pocket veto" is a narrow exception to the general rule that a bill becomes law if the President fails to return it to Congress within ten days. It can be constitutionally exercised only when the adjournment of Congress prevents the bill's return. Both Houses of Congress have specifically appointed agents for receipt of messages from the President and the President was not prevented from returning the bill with his objections to Congress.

3. H.R. 4042 has become law and the defendants are under a ministerial, non-discretionary duty to deliver and publish it as such. Plaintiffs seek an injunction and/or a writ of mandamus requiring the defendants to do so.

II

JURISDICTION

5. The jurisdiction of this Court arises under 28 U.S.C. § 1331 and § 1361; the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*; and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The claims in this case present questions under Article I, Section 7, Clause 2 of the United States Constitution, and federal statutes: 1 U.S.C. § 106(a), § 112 and § 113.

III

PLAINTIFFS

6. Plaintiff Michael D. Barnes is a citizen of the United States and a member of the 98th Congress representing the Eighth District of Maryland. He is Chairman of the House Sub-committee on Western Hemispheric Affairs and was responsible for the introduction of H.R. 4042. On September 30, 1983, he voted in favor of the bill.

7. Plaintiffs Gary Ackerman, M.C., 7th Dist. NY; Howard Berman, M.C., 26th Dist. CA; John Conyers, M.C., 1st Dist. MI; Ronald V. Dellums, M.C., 8th Dist. CA; Mervyn Dymally, M.C., 31st Dist. CA; Dennis

Eckart, M.C., 11th Dist. OH; Robert Edgar, M.C., 7th Dist. PA; Vic Fazio, M.C., 4th Dist. CA; Ed Feighan, M.C. 19th Dist. OH; Barney Frank, M.C., 4th Dist. MA; Robert Garcia, M.C., 18th Dist. NY; Samuel Gejdenson, M.C., 2nd Dist. CT; Peter Kostmeyer, M.C., 8th Dist. PA; Mickey Leland, M.C., 18th Dist. TX; Mel Levine, M.C., 27th Dist. CA; Robert Matsui, M.C. 3rd Dist. CA; Matt McHugh, M.C., 28th Dist. NY; Edward Markey, M.C., 7th Dist. MA; Barbara A. Mikulski, M.C. 3rd Dist. MD; Bruce Morrison, M.C. 3rd Dist. CT; Mary Rose Oakar, M.C., 20th Dist. OH; James Oberstar, M.C., 8th Dist. MN; Richard Ottinger, M.C., 20th Dist. NY; Patricia Schroeder, M.C., 1st Dist. CO; Ferdinand St. Germain, M.C., 1st Dist. RI; Gerry Studds, M.C., 10th Dist. MA; Robert Torricelli, M.C., 9th Dist. NJ; Bruce Vento, M.C. 4th Dist. MN; Ted Weiss, M.C., 17th Dist. NY; Howard Wolpe, M.C., 3rd Dist. MI; all, on information and belief, voted in favor of H.R. 4042 September 30, 1983.

8. Plaintiffs George Miller, M.C., 7th Dist. CA, and Paul Simon, M.C., 22nd Dist. IL, did not vote.

9. Plaintiff members of Congress who voted in favor of H.R. 4042 suffered injury in that their votes were nullified by defendants' refusal to deliver and publish H.R. 4042 as a law of the United States and in that they were denied an opportunity to override a presidential veto. As a result of defendants' actions the congressional branch of government has suffered a diminution of its power and the effectiveness of each of the plaintiffs as members of Congress has been diminished.

10. Plaintiff members of Congress, pursuant to their constitutional power to make appropriations, have, by passage of H.R. 4042, placed a condition precedent on further military aid to El Salvador. Unless H.R. 4042 is delivered and published as law by defendants such military aid to El Salvador will continue illegally, without the required presidential certification. Such an event will cause a

diminution in Congress' power over appropriations and a consequent diminution of the effectiveness of each plaintiff, who by voting for H.R. 4042, determined that military aid to El Salvador should cease on January 16, 1984, unless the appropriate presidential certification occurs.

11. Plaintiff members of Congress who did not vote on H.R. 4042 are injured in that the use of a pocket veto when the President is not prevented from exercising a return veto diminishes the power of Congress and the effectiveness of each member thereof.

IV

DEFENDANTS

12. Defendant Ronald Geisler is the Executive Clerk of the White House. It is his duty to receive enrolled bills and to deliver those that have become law to the Administrator of the General Services Administration for publication. He has failed to perform that duty with respect to H.R. 4042.

13. Defendant Gerald P. Carmen is the Administrator of the General Services Administration. He has a ministerial statutory duty to receive bills that have become law and publish them in slip form and in the United States Statutes at Large. He has failed to perform that task with respect to H.R. 4042.

V

FACTS

14. On September 30, 1983, by a unanimous voice vote, including the vote of plaintiffs named in paragraph 7 herein, the House of Representatives passed H.R. 4042, which provides that the current certification requirements with regard to El Salvador should continue "until such time as the Congress enacts new legislation providing conditions for United States military assistance to El Salvador

or until September 30, 1984, whichever occurs first." 129 Cong. Rec. H777 (daily ed. Sept. 30, 1983), *see* Exhibit A, attached hereto.

15. On November 17, 1983, the Senate passed H.R. 4042 by a unanimous voice vote. 129 Cong. Rec. S16468 (daily ed. Nov. 17, 1983), *see* Exhibit B, attached hereto.

16. The certification requirements which continue to apply under H.R. 4042 are those contained in Section 728 of the International Security and Development Cooperation Act of 1981, 22 U.S.C. § 2370, Public Law 97-113, § 728, 95 Stat. 1519, 1555-57 (1981), which provides that military assistance to El Salvador shall cease unless the President every 180 days certifies to the Speaker of the House of Representatives and to the Chairman of the Committee on Foreign Relations of the Senate that the Government of El Salvador:

- (1) is making a concerted and significant effort to comply with internationally recognized human rights;
- (2) is achieving substantial control over all elements of its own armed forces, so as to bring to an end the indiscriminate torture and murder of Salvador citizens by these forces;
- (3) is making continued progress in implementing essential economic and political reforms, including the land reform program;
- (4) is committed to the holding of free elections at an early date and to that end has demonstrated its good faith efforts to begin discussions with all major political factions in El Salvador which have declared their willingness to find and implement an equitable political solution to the conflict, with such solution to involve a commitment to—
 - (A) a renouncement of further military aid or paramilitary activity; and
 - (B) the electoral process with internationally recognized observers.

Each such certification shall discuss fully and completely the justification for making each of the determinations required by paragraphs (1) through (4).

(e) On making the first certification under subsection (b) of this section, the President shall also certify to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that he has determined that the Government of El Salvador has made good faith efforts both to investigate the murders of the six United States citizens in El Salvador in December 1980 and January 1981 and to bring to justice those responsible for those murders.

17. Under H.R. 4042, the President is required to make the necessary certification on or about January 16, 1984.

18. On November 18, 1983, H.R. 4042 was presented to the President for his consideration pursuant to Article I, Section 7, Clause 2, of the United States Constitution. 129 Cong. Rec. H10663 (daily ed. Dec. 14, 1983), *see* Exhibit C, attached hereto.

19. On November 18, 1983, both the House of Representatives and the Senate adjourned the First Session of the 98th Congress, in accordance with the principles of House Concurrent Resolution 221 and House Joint Resolution 421. 129 Cong. Rec. H10469, S16779, S16858, S17192-3 (daily ed. Nov. 18, 1983); 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983).

20. Both the House of Representatives and Senate adjourned until January 23, 1984, at 12:00 noon, but provided in a special concurrent resolution for their earlier reassembly on short notice whenever in the opinion of the Speaker of the House of Representatives and the Majority Leader of the Senate, "the public interest shall warrant it." (H. Cong. Res. 221, 98th Cong., 1st Sess.; H-J. Res. 421,

98th Cong., 1st Sess.; 129 Cong. Rec. S16858 (daily ed. Nov. 18, 1983); 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983).

21. The Rules of the House of Representatives provide standing authority for the Clerk to receive messages from the President at any time that the House is not in session. *Rules of the House of Representatives*, 98th Cong., 1st Sess., Rule III.5 (1983) (hereinafter *Rules of the House*), see Exhibit D, attached hereto; and for the Speaker to sign enrolled bills when the House is not in session, see *Rules of the House*, I.

22. The Senate, prior to adjourning, unanimously resolved "that during the *sine die* adjournment of the Senate, messages from the President of the United States and the House of Representatives may be received by the Secretary of the Senate and appropriately referred," and that the President of the Senate and the President pro tempore, are "authorized to sign duly enrolled bills and joint resolutions," and make appointments to commissions or committees, notwithstanding the *sine die* adjournment. S. Res. 298, 98th Cong., 1st Sess.; 129 Cong. Rec. S17192 (daily ed. Nov. 18, 1983); S. Res. 301, 98th Cong., 1st Sess.; 129 Cong. Rec. S17192 (daily ed. Nov. 18, 1983).

23. On November 30, 1983, the President issued a statement that he "withheld approval of H.R. 4042, an enrolled bill that would require two Presidential certifications in 1984. . ." Statement by the Principal Deputy Press Secretary, Nov. 30, 1983; 19 Weekly Comp. of Pres. Doc. 1627 (Nov. 30, 1983), see Exhibit E, annexed hereto; President's action noted in 129 Cong. Rec. D1604 (daily ed. Dec. 14, 1983).

24. More than ten days (excluding Sundays) have passed since Congress sent H.R. 4042 to the President; he has neither signed the bill nor returned it to Congress with his objections.

25. President Reagan did not veto H.R. 4042 pursuant to the procedures set forth in Article I, Section 7, clause 2 of the United States Constitution as both houses had made arrangements for the authorized receipt of messages during their adjournments, and the President was not prevented from exercising a return veto.

26. President Reagan's attempted use of the pocket veto is contrary to the practice of presidents Carter and Ford. President Carter never employed a "pocket veto" during inter-session or intrasession adjournments but always used the return veto. President Ford consented to entry of summary judgment in *Kennedy v. Jones*, 412 F.Supp. 353 (D.D.C. 1976), and "determined that he [would] use the return veto rather than the pocket veto during intrasession and intersession recesses and adjournments," where appropriate arrangements for receipt of presidential messages were made. (Cong. Rec., Apr. 26, 1976, S11202).

27. As President Reagan has not returned H.R. 4042 to Congress within ten days (Sundays excepted) after it had been presented to him, H.R. 4042 has become law.

28. Defendant Geisler, Executive Clerk of the White House, has to date failed in his duty to deliver H.R. 4042, a law of the United States, to the defendant Administrator of the General Services Administration for publication.

29. Defendant Carmen, Administrator of the General Services Administration, has to date failed to publish H.R. 4042 as a law of the United States, as required by Article I, Section 7, clause 2, of the United States Constitution, and 1 U.S.C. §§ 106(a), 112 and 113.

30. Defendants by their failure to deliver and publish H.R. 4042 as a law of the United States have nullified plaintiffs' votes in favor of the bill.

VI

CAUSE OF ACTION

31. As a CAUSE OF ACTION, plaintiffs repeat and reallege each and every allegation above as if set forth herein.

32. The aforesaid acts and omissions of defendants violate Article I, Section 7, Clause 2, of the United States Constitution and violate 1 U.S.C. §§ 106(a), 112 and 113.

VII

IRREPARABLE INJURY

33. Plaintiffs have no adequate remedy of complete remedy at law to redress the violations of constitutional and statutory law alleged herein. Plaintiffs face immediate and irreparable injury from the acts and omissions of defendants.

RELIEF

A. DECLARATORY RELIEF

1. A declaration that H.R. 4042 is a valid law of the United States.

2. A declaration that defendants are under a ministerial, nondiscretionary duty to deliver and to publish H.R. 4042 as a law of the United States in accordance with the provisions of 1 U.S.C. §§ 106a, 112 and 113.

B. INJUNCTIVE OR MANDAMUS RELIEF

1. A Writ of Mandamus and/or a preliminary or permanent injunction directing defendant Geisler to deliver H.R. 4042 to the Administrator of the General Services Administration for publication.

2. A Writ of Mandamus and/or a preliminary or permanent injunction directing defendant Carmen to publish H.R. 4042 in slip form and in the United States Statutes at Large.

C. OTHER RELIEF

1. An award of such other and further relief this Court deems just and proper.

Respectfully submitted,

MICHAEL RATNER
MARGARET RATNER
ELLEN YAROSHEFSKY
MORTON STAVIS
PETER WEISS
ANNE SIMON

Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303

JOHN PRIVITERA
1302 18th Street, N.W.
Washington, D.C. 20006
(202) 785-8900

Attorneys for Plaintiffs

Dated: Washington, D.C.
January 4, 1983

EXHIBITS

Exhibit "A": 129 Cong. Rec. H7777 (daily ed. Sept 30, 1983).

Exhibit "B": 129 Cong. Rec. S16468 (daily ed. Nov. 17, 1983).

Exhibit "C": 129 Cong. Rec. H10663 (daily ed. Dec. 14, 1983).

Exhibit "D": Rule III.5, Rules of the House of Representatives. 98th Congress, 1st Sess. (1983).

Exhibit "E": Statement by the Principal Deputy Press Secretary, (concerning H.R. 4042) Nov. 30, 1983.

The future depends on a large degree, on the kinds of decisions we make on farm policy, but it impacts from the futures industry to Wall Street to big to small to international banking. And the fact is that the policy can well decide how we survive as a nation.

I know it is very difficult for some of our colleagues to understand, but if the food is not there today, forget everything else that we do here in this House-war powers, Export Administration, budget, everything else that we do. If you do not have the food that day, forget it, that is the end of the ball game.

I would like to follow up with what my colleague has said that the responsibility is going to be ours, the consumers, labor, business, and all Americans to see that the base for our sustenance, which is the agricultural area, the farm sector, is sustained and maintained in a viable, productive posture so that it will help all of us for the future as a nation and as a people.

CONTINUING IN EFFECT CURRENT CERTIFICATION REQUIREMENTS WITH RESPECT TO EL SALVADOR

Mr. BARNES. Mr. Speaker, I ask unanimous consent that the Committee on Foreign Affairs be discharged from further consideration of the bill (H.R. 4042) to continue in effect the current certification requirements with respect to El Salvador until the Congress enacts new legislation providing conditions for U.S. military assistance to El Salvador or until the end of fiscal year 1984, whichever occurs first, and ask for its immediate consideration.

The Clerk read the title of the bill. The SPEAKER pro tempore (Mr. Alexander). Is there objection to the request of the gentleman from Maryland?

Mr. LAGOMARSINO. Reserving the right to object, Mr. Speaker, and I shall not object, I do so for the purpose of asking the chairman of the Subcommittee on Western Hemisphere Affairs to explain what the bill does.

Mr. BARNES. If the gentleman will yield, I thank the distinguished ranking minority member of the Subcommittee on Western Hemisphere Affairs for allowing me this opportunity to explain the bill.

Very briefly, the bill simply extends the current law with respect to conditions on military assistance to Salvador until we either pass the new bill which has been reported out of the Foreign Affairs Committee on which a compromise was worked out on the modification of the current conditions, or until the end of the new fiscal year, whichever is earlier. Obviously, we hope that the new conditions will be enacted into law in a brief time and that the former conditions would continue to apply until the new law is enacted.

I am informed that, although the administration does not believe it is necessary to extend the current conditions, they do not object to this legislation. We had a unanimous vote yesterday, Republicans and Democrats, in the House Foreign Affairs Committee. So I would think that it is not controversial.

Basically, it would assure that we are still on record as wanting progress in certain areas. Particularly we are concerned, obviously about the protection of individuals who are responsible for the murders of American citizens; we are concerned about continuing violations of human rights; we are concerned about the land reform program. There was a march in the capital city, San Salvador, just a couple of days ago, 15,000 campesinos, urging continuation of the program, and this simply will keep the Congress on record in support of those continued efforts of people in El Salvador to bring about these changes in conditions.

Mr. LAGOMARSINO. Mr. Speaker, further reserving the right to object, we did receive word from the White House this morning that, as the gentleman says, while the administration did not ask for this extension, while they do not think it is necessary because, as they told us yesterday, they intend to comply with its conditions in any event, they do not object to it, nor do I.

I would like to say that while I think it would have been better to have passed the language, concerning conditions on military aid to El Salvador, that is in the pending foreign assistance legislation, I understand the reasons why that is not practical. The requirement of conditions and certification expires at midnight tonight. We can hardly do that today. And that would have to be the case. The House here would have had to been educated about the new provisions, the Senate would have had to been educated. They have a slightly different view of what ought to be done. There just is not time. I hope we can adapt the new proposals in the days and weeks to come.

I think it would be an unfortunately bad signal to send were we not to extend certification, not only to those who have been abusing human rights in El Salvador, but I think even more importantly, to those who want to do the right thing, who need all of the help they can get in bringing about democratic changes and changes in human rights in El Salvador.

Mr. ZABLOCKI. Mr. Speaker, I rise in support of H.R. 4042, a bill to continue in effect the current certification requirements with respect to El Salvador until the Congress enacts new legislation.

This bill is straightforward and noncontroversial. It simply extends the existing certification requirements for military aid to El Salvador until new

legislation is enacted or until September 30, 1984, whichever occurs first.

We all recognize the deficiencies in the current certification process. However, we have not yet enacted new legislation on El Salvador for fiscal year 1984. Therefore, unless the current law is extended, there will be no conditions of any kind on military aid to El Salvador after September 30. So, while this may be an imperfect mechanism, I think it is the best one available until we are able to bring the new foreign assistance authorization bill to the floor.

I urge my colleagues to support the bill.

Mr. LAGOMARSINO. Mr. Speaker, I withdraw my reservation of objection.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Maryland?

There was no objection.

The Clerk read the bill, as follows:

H.R. 4042

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the requirements of section 726 of the International Security and Development Cooperation Act of 1981 (including the last sentence of subsection (e) of that section) shall continue to apply after the end of the fiscal year 1983 until such time as the Congress enacts new legislation providing conditions for United States military assistance to El Salvador or until September 30, 1984, whichever occurs first.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. BARNES. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the bill just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Maryland?

There was no objection.

PROVIDING TEMPORARY EXTENSION OF CERTAIN INSURANCE PROGRAMS RELATING TO HOUSING AND COMMUNITY DEVELOPMENT

Mr. GONZALEZ. Mr. Speaker, I ask unanimous consent to take from the Speaker's table the joint resolution (H.J. Res. 366) to provide for the temporary extension of certain insurance programs relating to housing and community development, and for other purposes, with a Senate amendment thereto, and concur in the Senate amendment.

The Clerk read the title of the joint resolution.

The Clerk read the Senate amendment, as follows:

Page 3, after line 3, insert:

[37]-

House of Representatives

WEDNESDAY, DECEMBER 14, 1983

SENATE ENROLLED BILLS SIGNED AFTER SINE DIE ADJOURNMENT

The SPEAKER announced his signature to enrolled bills of the following title on the following date:

On November 22, 1983:
S. 571. An act to provide for the conveyance of certain Federal lands adjacent to Orchard and Lake Shore Drives, Lake Lowell, Boise project, Idaho.
S. 1048. An act to clarify the applicability of a provision of law regarding risk retention.
S. 1341. An act to revise and extend the Education of the Handicapped Act, and for other purposes.
S. 1533. An act to direct the Secretary of Agriculture to release on behalf of the United States a revolutionary interest in certain land in the State of Delaware; and
S. 1837. An act to designate the Federal Building in Seattle, Wash., as the "Henry M. Jackson Federal Building."

On November 29, 1983:

S. 505. An act to designate the Federal building to be constructed in Savannah, Ga., as the "Juliette Gordon Low Federal Building."
S. 529. An act to authorize \$15,500,000 for capital improvement on Guam, and for other purposes.
S. 574. An act to amend chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), to improve the quality and efficiency of the military justice system, to revise the laws concerning review of courts-martial, and for other purposes.
S. 1099. An act to consolidate and authorize certain marine fishery programs and functions of the National Oceanic and Atmospheric Administration under the Department of Commerce; and
S. 2129. An act to provide revised reimbursement criteria for small rural health clinics utilizing National Health Service Corps personnel.

ENROLLED BILLS AND JOINT RESOLUTIONS SIGNED AFTER SINE DIE ADJOURNMENT

Mr. HAWKINS, from the Committee on House Administration, reported that that committee had examined and found truly enrolled bills and joint resolutions of the House of the following titles, which were thereupon signed by the Speaker on the following dates:

On November 22, 1983:
H.R. 724. An act for the relief of Carlos McBrano Gauson.
H.R. 2198. An act to extend the authorization of appropriations of the National Historical Publications and Records Commission for 5 years.
H.R. 2293. An act to revise the authority and responsibility of the Office of Federal

Procurement Policy, to authorize appropriations for the Office of Federal Procurement Policy for an additional 4 fiscal years, and for other purposes.
H.R. 2355. An act to extend the Wetlands Loan Act.

H.R. 2479. An act to amend the act of March 3, 1859, incorporating the Masonic Relief Association of the District of Columbia, now known as Aracis Mutual Life Insurance Co.

H.R. 2785. An act to amend the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act relating to the scientific advisory panel and to extend the authorization for appropriations for such act.

H.R. 3806. An act to amend the Arms Control and Disarmament Act in order to extend the authorization for appropriations.

H.R. 2815. An act to authorize appropriations for fiscal years 1984 and 1985 for the Department of State, the U.S. Information Agency, the Board for International Broadcasting, the Inter-American Foundation, and the Asia Foundation, to establish the National Endowment for Democracy, and for other purposes.

H.R. 3285. An act to stabilize the supply and demand for dairy products, to make modifications in the tobacco production adjustment program, to provide emergency livestock feed assistance, and for other purposes.

H.R. 3763. An act to declare that the United States holds certain lands in trust for the Las Vegas Paiute Tribe.

H.R. 4232. An act to suspend the noncash benefit requirement for the Puerto Rico nutrition assistance program, to provide States with greater flexibility in the administration of the food stamp program, and for other purposes.

H.R. 4294. An act to name the Veterans' Administration Medical Center in Altoona, Pa., the "James E. Van Zandt Veterans' Administration Medical Center," and to name the Veterans' Administration Medical Center in Dublin, Ga., the "Carl Vinson Veterans' Administration Medical Center."

H.R. 4476. An act to extend the authorities under the Export Administration Act of 1979, and for other purposes.

H.J. Res. 311. Joint resolution to proclaim March 20, 1984, as "National Agriculture Day."

H.J. Res. 324. Joint resolution to designate the week beginning January 15, 1984, as "National Fetal Alcohol Syndrome Awareness Week."

H.J. Res. 381. Joint resolution to provide for appointment of Samuel Curtis Johnson as a citizen regent of the Board of Regents of the Smithsonian Institution.

H.J. Res. 405. Joint resolution to extend the term of the Presidential Commission for the German-American Tricentennial, and for other purposes; and

H.J. Res. 421. Joint resolution providing for the convening of the 2d session of the 98th Congress, and for other purposes.

On November 29, 1983:

H.R. 1035. An act to make certain technical amendments to improve implementation

of the Education Consolidation and Improvement Act of 1981, and for other purposes.

H.R. 2735. An act to authorize appropriations for the Federal Communications Commission for fiscal years 1984 and 1985, and for other purposes.

H.R. 2958. An act to authorize appropriations for fiscal year 1984 for intelligence and intelligence-related activities of the U.S. Government, for the intelligence community staff, for the Central Intelligence Agency Retirement and Disability System, and for other purposes.

H.R. 3959. An act making supplemental appropriations for the fiscal year ending September 30, 1984, and for other purposes; and

H.R. 4185. An act making appropriations for the Department of Defense of the fiscal year ending September 30, 1984, and for other purposes.

BILLS PRESENTED TO THE PRESIDENT

Mr. HAWKINS, from the Committee on House Administration, reported that that committee did on November 18, 1983, present to the President, for his approval, bills and joint resolutions of the House of the following titles:

H.R. 24. An act to make certain land owned by the United States in the State of New York part of the Treen Mountain National Forest.

H.R. 2230. An act to amend Civil Rights Act of 1957 to extend the life of the Civil Rights Commission, and for other purposes.

H.R. 2390. An act to amend the Agricultural Adjustment Act to authorize marketing research and promotion projects, including paid advertising, for farmers, and to amend the Potato Research and Promotion Act.

H.R. 2592. An act to transfer from the Director of the Office of Management and Budget to the Administrator of General Services the responsibility for publication of the catalog of Federal domestic assistance programs, and for other purposes.

H.R. 2780. An act to extend and amend the provisions of title 31, United States Code, relating to the general revenue sharing program.

H.R. 4013. An act to extend the small business development center program administered by the Small Business Administration until January 1, 1985.

H.R. 4042. An act to continue in effect the current certification requirements with respect to Salvador until the Congress enacts new legislation providing conditions for U.S. military assistance to El Salvador or until the end of fiscal year 1984, which ever occurs first.

H.J. Res. 93. Joint resolution to provide for the awarding of a special gold medal to Danny Thomas in recognition of his humanitarian efforts and outstanding work as an American.

□ This symbol represents the time of day during the House proceedings, e.g., □ 1:407 is 2:07 p.m.
• This "bullet" symbol identifies statements or insertions which are not spoken by the Member on the floor.

H 10663

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EXHIBIT "C"

RULE II

ELECTION OF OFFICERS

There shall be committees and in such other places in the Capitol and the House Office Buildings as he deems appropriate. Such system may include other telecommunications functions as he deems appropriate.

(b)(1) He shall devise and implement a system subject to his direction and control for complete and unedited audio and visual broadcasting and recording of the proceedings of the House of Representatives. He shall provide for the distribution of such broadcasts and recordings thereof to news media and the storage of audio and video recordings of the proceedings.

(2) All television and radio broadcasting stations, networks, services, and systems (including cable systems) which are accredited to the House radio and television correspondents' galleries, and all radio and television correspondents who are accredited to the radio and television correspondents' galleries shall be provided access to the live coverage of the House of Representatives.

(3) No coverage made available under this clause nor any recording thereof shall be used for any political purpose.

(4) Coverage made available under this clause shall not be broadcast with commercial sponsorship except as part of bona fide news programs and public affairs documentary programs. No part of such coverage or any recording thereof shall be used in any commercial advertisement.

(c) He may delegate any of his responsibilities under this clause to such legislative entity as he deems appropriate.

10. (a) There is hereby established in the House of Representatives an office to be known as the Office for the Bicentennial of the House of Representatives. This office will coordinate the planning of the commemoration of the two-hundredth anniversary of the House of Representatives.

(b) The management, supervision, and administration of the Office shall be under the direction of the Speaker of the House of Representatives and shall be staffed by a professional historian. The Historian shall be appointed by the Speaker of the House of Representatives without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. Any person so appointed shall serve at the pleasure of the Speaker.

(c) All expenses of such office may be paid from the contingent fund of the House on vouchers solely approved and signed by the Speaker, until otherwise provided by law or resolution.

(d) The Office shall cease to exist not later than September 30, 1989, unless otherwise provided by law or resolution.

RULE III

There shall be elected by a viva voce vote, at the commencement of each Congress, to continue in office until their successors are chosen and qualified, a Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and Chaplain, each of whom shall take an oath to support the Constitution of the United States, and for the true and faithful discharge of the duties of his office to the best of his knowledge and ability, and to keep the secrets of the House; and each shall appoint all of the employees of his department provided for by law.

RULE III

DUTIES OF THE CLERK

1. The Clerk shall, at the commencement of the first session of each Congress, call the Members to order, proceed to call the roll of Members by State in alphabetical order, and pending the election of a Speaker or Speaker pro tempore, preserve order and decorum, and decide all questions of order subject to appeal by any Members.

2. He shall make and cause to be printed and delivered to each Member, or mailed to his address, at the commencement of every regular session of Congress, a list of the reports which it is the duty of any officer or Department to make to Congress, referring to the act or resolution and page of the volume of the laws or Journal in which it may be contained, and placing under the name of each officer the list of reports required of him to be made.

3. He shall note all questions of order, with the decisions thereon, the record of which shall be printed as an appendix to the Journal of each session, and complete, as soon after the close of the session as possible, the printing and distribution to Members, Delegates, and the Resident Commissioner from Puerto Rico of the Journal of the House, together with an accurate and complete index; retain in the library at his office, for the use of the Members, Delegates, the Resident Commissioner from Puerto Rico and officers of the House and not to be withdrawn therefrom, two copies of all the books and printed documents deposited there; send, at the end of each session, a printed copy of the Journal thereof to the executive and to each branch of the legislature of every State; deliver or mail to any Member, Delegate or the Resident Commissioner from Puerto Rico an extra copy, in binding of good quality, of each document requested by that Member, Delegate, or the Resident Commissioner which has been printed, by order of either House of the Congress, in any Congress in which he served; attest and affix the seal of the House to all writs, warrants, and subpoenas issued by order of the House, certify to the

passage of all bills and joint resolutions, make or approve all contracts, bargains, or agreements relative to furnishing any matter or thing, or for the performance of any labor for the House of Representatives, in pursuance of law or order of the House, keep full and accurate accounts of the disbursements out of the contingent fund of the House, keep the stationery and account of Members, Delegates, and the Resident Commissioner from Puerto Rico, and pay them as provided by law. He shall pay to the officers and employees of the House of Representatives the amount of their salaries that shall be due them.

4. He shall, in case of temporary absence or disability, designate an official in his office to sign all papers that may require the official signature of the Clerk of the House, and to do all other acts except such as are provided for by statute, they may be required under the rule and practice of the House to be done by the Clerk. Such official acts, when so done by the designated official, shall be under the name of the Clerk of the House. The said designation shall be in writing, and shall be laid before the House and entered on the Journal.

5. The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session.

6. He shall supervise the staff and manage any office of a Member who is deceased, has resigned, or been expelled until a successor is elected and shall perform similar duties in the event that a vacancy is declared by the House in any congressional district because of the incapacity of the Member representing such district or other reason. Whenever the Clerk is acting as a supervisory authority over such staff, he shall have authority to terminate employees, and he may appoint, with the approval of the Committee on House Administration, such staff as is required to operate the office until a successor is elected. He shall maintain on the House payroll and supervise in the same manner staff appointed pursuant to section 800 of Public Law 91-655 (2 U.S.C. 31b-5) for sixty days following the death of a former Speaker.

RULE IV

DUTIES OF THE SERGEANT-AT-ARMS

1. It shall be the duty of the Sergeant-at-Arms to attend the House during its sittings, to maintain order under the direction of the Speaker or Chairman, and, pending the election of a Speaker or Speaker pro tempore, under the direction of the Clerk, execute the commands of the House, and all processes issued by authority thereof, directed to him by the Speaker, and keep the accounts for the pay and mileage of Members, Delegates, and the Resident Commissioner from

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

November 30, 1983

STATEMENT BY THE PRINCIPAL DEPUTY PRESS SECRETARY

The President today withheld approval of H.R. 4042, an enrolled bill that would require two Presidential certifications regarding El Salvador in 1984 or until the enactment of new legislation imposing conditions on U.S. military assistance for that country.

This Administration is firmly committed to the protection of human rights, economic and political reforms, the holding of elections, and progress in prosecuting the cases of murdered American citizens in El Salvador. However, the process of certification as called for in H.R. 4042 would not serve to support these endeavors.

His decision to oppose this certification legislation reflects the Administration's policy that such requirements distort our efforts to improve human rights, democracy, and recovery in El Salvador. The key certification provisions of the present bill are already addressed in this year's Continuing Resolution which requires a separate certification on progress in the area of land reform and withholds 30 percent of military assistance funds until the Government of El Salvador has completed the investigation and trial in the churchwomen's case.

At the same time, the President wishes to emphasize that the Administration remains fully committed to the support of democracy, reform, and human rights in El Salvador. Those very concerns are a central component of our policy. They were clearly articulated by our Ambassador Tom Pickering as recently as last Friday. The withholding of approval from H.R. 4042 in no way reflects a lessening of our interests in these critical areas. The President has also instructed the Department of State to continue to provide the Congress with periodic public reports--the next on January 16, 1984--on the political, economic, and military situation in El Salvador.

Working with the leadership of the Government of El Salvador, we will reconfirm our joint resolve to take whatever action is necessary to help the Government of El Salvador to end the reprehensible activities of the violent right as well as the violent left. The United States will also work to preserve and expand the progress that has been achieved in the area of land reform and to maintain the momentum toward holding open and democratic elections next year in accordance with the provision of the new constitution being prepared in El Salvador's Constituent Assembly.

There must exist a genuine awareness, both in the U.S. as well as in El Salvador, that our countries' strong and productive relationship can only be based on shared values in justice and democracy, and on concerted and sustained efforts to achieve these goals. We know that President Alvaro Magana of El Salvador shares these views, and we will remain in touch on developing enhanced efforts that will strengthen human rights ties.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. _____

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE HOUSE OF REPRESENTATIVES, ET AL.,
PLAINTIFFS,

-against-

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE GENERAL SERVICES
ADMINISTRATION, AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs herein respectfully move this Court, pursuant to Rule 65, Fed. R. Civ. P., and upon the annexed affidavit of Congressman Richard L. Ottinger, the Complaint and the Statement of Points and Authorities, separately filed, for the entry of a preliminary injunction, requiring defendant Geisler to deliver H.R. 4042, 98th Congress, 1st Session, to defendant Carmen, and requiring defendant Carmen to print H.R. 4042 as a law.

Respectfully submitted,

MICHAEL D. RATNER
MARGARET L. RATNER
ELLEN YAROSHEFSKY
MORTON STAVIS
PETER WEISS
ANNE E. SIMON

5. I am reliably informed by counsel that the provisions of the Constitution relating to a pocket veto are not applicable to the circumstances herein because the ad-

jourment of Congress during which the President purported to act was only an intersession adjournment and Congress had designated appropriate officials to receive messages from the President during such adjournment.

6. On information and belief, the defendants herein, whose responsibility includes the delivery and publication of enrolled bills, have failed to do so, since they apparently accepted the view of the President that he has effectively vetoed H.R. 4042.

7. As a result of the foregoing, I suffer irreparable injury because:

a. My vote and the votes of my colleagues have been nullified;

b. In order to enforce the will of Congress as expressed in H.R. 4042, it will be necessary to undertake the burden of the legislative process a second time, which involves the reintroduction of legislation, the participation of committees in the House and Senate, and other procedures of Congress; and

c. Military aid will continue to be sent to El Salvador, despite the absence of the January 16, 1984 certification required by Congress that the government of El Salvador is making progress with regard to human rights and control over its armed forces, implementing economic and political reforms, holding free elections, and entering into good faith discussions to resolve the present conflict in El Salvador.

8. I have no adequate or complete remedy at law for the injuries set forth above.

I declare that the foregoing is true under the penalty of perjury.

/s/ Richard L. Ottinger
RICHARD L. OTTINGER

December 30, 1983

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE HOUSE OF REPRESENTATIVES, ET AL.,
PLAINTIFFS,

-against-

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE GENERAL SERVICES
ADMINISTRATION, AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS.

MOTION TO SHORTEN TIME FOR FILING OF
OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION
AND TO SHORTEN TIME FOR ORAL HEARING ON
PRELIMINARY INJUNCTION

Plaintiffs herein respectfully request, upon the annexed declaration of Michael Ratner, Esq., and the Statement of Points and Authorities, separately filed, that the time of defendants to file an opposition to plaintiffs' Motion for Preliminary Injunction, filed January 4, 1984, be shortened so that defendants' opposition must be served no later than 5:00 p.m. January 9, 1984. Plaintiffs further request that an oral hearing on their Motion for Preliminary Injunction be set for January 11, 1984.

Respectfully submitted,
MICHAEL D. RATNER
MARGARET L. RATNER
ELLEN YAROSHEFSKY

MORTON STAVIS
 PETER WEISS
 ANNE E. SIMON
Center for Constitutional Rights
 853 Broadway
 New York, N.Y. 10003
 (212) 674-3303

JOHN PRIVATERA
 1302 18th Street, N.W.
 Washington, D.C. 20006
 (202) 785-8900

Attorneys for Plaintiffs

Dated: New York, N.Y.
 January 4, 1984

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, ET AL.,
 PLAINTIFFS,

-against-

GERALD P. CARMEN, ET. AL.,
 DEFENDANTS.

**DECLARATION OF MICHAEL RATNER IN SUPPORT OF
 MOTION TO SHORTEN TIME FOR DEFENDANTS TO SERVE
 AND FILE OPPOSITION AND TO SHORTEN TIME FOR
 ORAL ARGUMENT**

MICHAEL D. RATNER, hereby declares under penalty of perjury:

1. I am one of the attorneys for plaintiffs in this action, and make this declaration in support of plaintiffs' motion to shorten time for the briefing and hearing on plaintiffs' motion for a preliminary injunction requiring defendants to deliver and publish H.R. 4042 as a validly enacted law.

2. The injury to plaintiffs from defendants' failure to deliver and publish H.R. 4042 as law is ongoing, immediate, and irreparable. Plaintiffs' votes on H.R. 4042 have been nullified and a specific condition precedent placed on continued military aid to El Salvador has been nullified. *See*, Plaintiffs' Statement of Points and Authorities in Support of Motion for Preliminary Injunction, Point I (hereinafter, "PS").

3. As a result of two imminent events occurring prior to the time in which this case could normally be heard, the harm to plaintiffs will be rendered irreparable.

4. Under the certification requirements continued by H.R. 4042, *See* PS at Statement of Facts, the President is required to make a certification regarding human rights progress in El Salvador on January 16, 1984, if military aid to that country is to continue. Because the bill is not published as law, the President will not make the required certification on January 16, 1984. Therefore, beginning January 15, 1984, and until President Reagan makes the required certification, all military aid to El Salvador will be given without the certifications required by Congress. That aid, once given, cannot be retrieved. Therefore, plaintiffs must have a ruling prior to January 16, 1984.

5. The 98th Congress is scheduled to reconvene on January 23, 1984. If H.R. 4042 has not been published as law at that point, Congress will face the burden of having to reintroduce and repass a similar certification requirement. Only a court ruling from this Court before January 23, 1984 will ensure that Congress is not put to this additional burden. A court ruling after that date will be too late.

6. Defendants and their attorneys will be personally served on January 4, 1984, the date of filing.

7. Plaintiffs will suffer irreparable injury if a preliminary injunction is not issued quickly. Therefore, plaintiffs respectfully request that defendants' opposition should be filed and received by plaintiffs by 5:00 p.m., January 9, 1984, and further request that a hearing on the motion for a preliminary injunction be set for January 11, 1984. Plaintiffs will file their reply brief prior to the hearing. Such a schedule will hopefully enable this Court to issue a ruling prior to January 16, 1984.

8. I declare under penalty of perjury that the foregoing is true and correct.

WHEREFORE, I respectfully request that this Court issue an order shortening time for the briefing and hearing on the preliminary injunction.

MICHAEL D. RATNER

Executed in New York, N.Y.
January 4, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020
(Jackson, J.)

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,

-against-

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE GENERAL SERVICES
ADMINISTRATION, AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS.

NOTICE OF APPEAL

Notice is hereby given that plaintiffs Michael D. Barnes,
et al., above named, hereby appeal to the United States
Court of Appeals for the District of Columbia Circuit
from the order entered on January 9, 1984, the effect of
which is to deny plaintiffs the preliminary injunction relief
sought in the action below.

MICHAEL D. RATNER
MARGARET L. RATNER
ELLEN YAROSHEFSKY
ANNE E. SIMON
MORTON STAVIS
PETER WEISS

Center for Constitutional Rights
853 Broadway
New York, N.Y. 10003
(212) 674-3303

JOHN PRIVITERA
1302 18th Street, N.W.
Washington, D.C. 20036
(202) 785-8900

Counsels for Plaintiffs

Dated: January 10, 1984
New York, New York

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS-APPELLANTS,

-against-

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR, GENERAL SERVICES
ADMINISTRATION; AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS-APPELLEES

IN RE MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS
CAPACITY AS A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PETITIONERS.

EMERGENCY MOTION FOR EXPEDITED APPEAL AND
DECISION THEREON OR FOR ISSUANCE OF
A WRIT OF MANDAMUS

Plaintiff Michael D. Barnes, member of Congress and chairman of the Subcommittee on Western Hemispheric Affairs of the House of Representatives, and thirty two other plaintiff members of Congress, by and through their attorneys request this Court to take emergency action either:

(1) granting an expedited appeal and ordering that a preliminary injunction issue requiring defendants to deliver and print H.R. 4042, 98th Cong, 1st Sess., as a law of the United States by or as close in time to January 16, 1984 as is possible; or

(2) granting expedited consideration of their petition for a writ of mandamus and directing the District Judge to forthwith and as close as possible in time to January 16, 1984 hold a hearing and render a decision on plaintiffs' request for a preliminary injunction directing the delivery and printing of H.R. 4042, 98th Cong., 1st Sess., as law.

TIMELINESS OF MOTION

This motion requests relief within seven days or as soon thereafter as possible. The motion could not have been filed earlier. Plaintiffs filed a motion and supporting memorandum for a preliminary injunction with the District Court on January 4, 1984, accompanied by a motion to shorten time thereon. On January 9, 1984 the District Court (Jackson, J.) heard argument on the motion to shorten time, denied said motion and set February 22, 1984 for a hearing on the preliminary injunction and the permanent injunction. (A. 129-130). Plaintiffs have filed these papers as soon thereafter as was possible.

Court action is necessary by or as close in time to January 16, 1984, to avoid irreparable injury to plaintiffs. Plaintiffs are members of Congress who voted for H.R. 4042, a bill imposing certain certification requirements on aid to El Salvador. These requirements take effect on January 16, 1984. Under the bill's provisions, aid to El Salvador is to cease until certification occurs. The President purportedly exercised a "pocket veto" of H.R. 4042 during an intersession of Congress despite Congress' appointment of a clerk to accept messages from the President. Plaintiffs contend that said "pocket veto" is unconstitutional and that H.R. 4042 is law. Without immediate relief, plaintiffs' votes for H.R. 4042 will be nullified; the restrictions that H.R. 4042 places on aid to El Salvador will not go into effect. Each day of delay after

January 16, 1984, will cause irreparable injury to the effectiveness of plaintiffs' votes. The accompanying memorandum discusses the factors which necessitate the requested emergency relief.

NOTICE AND SERVICE OF MOTION AND PAPERS

On January 10, 1984 counsel for plaintiffs spoke with Mark Johnston, an attorney with the Appellate Staff of the Department of Justice. I informed him of plaintiffs' intention to file this appeal and mandamus and the relief requested. He asked that the papers be personally served upon him, which will be done on January 11, 1984.

Respectfully submitted,

MICHAEL RATNER
MARGARET RATNER
ELLEN YAROSHEFSKY
ANNE E. SIMON
MORTON STAVIS
PETER WEISS

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Dated: New York, N.Y.
January 10, 1984

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5013

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.

No. 84-5014

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR, GENERAL SERVICES
ADMINISTRATION AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE

September Term, 1983

Filed Jan. 13, 1984

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

ORDER

Upon consideration of appellants/petitioners' emergency motions for expedited appeals and stay, or for issuance of a writ of mandamus, and of the response ordered by the Court, it is

ORDERED by the Court that the motions are denied. See *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). It is

FURTHER ORDERED by the Court that the petition for writ of mandamus is denied.

Per Curiam

For the Court

/s/ Daniel M. Cathey

DAN'EL M. CATHEY
First Deputy Clerk

Circuit Judge Tamm did not participate in this order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, ETC. ET AL.,
DEFENDANTS.

Judge Jackson

MOTION OF THE UNITED STATES SENATE TO INTERVENE

The United States Senate moves to intervene in this action pursuant to sections 703(c), 706(a), and 713(a) of the Ethics in Government Act of 1978, 2 U.S.C. §§ 288b(c), 288e(a), and 288l(a) (1982), Rule 24(a) of the Federal Rules of Civil Procedure, and S. Res. 313, 98th Cong., 2nd Sess. (1984), a copy of which is attached. This intervention is in support of the claim, under Article I, Section 7, Clause 2 of the Constitution, that H.R. 4042, 98th Congress, became law when the President did not return it with his objections to the House in which it had originated.

Section 713(a) of the Ethics in Government Act of 1978, 2 U.S.C. § 288l(a) (1982), provides that intervention by the Senate as a party shall be of right and may only be denied on an express finding by the Court that intervention is untimely and would significantly delay the pending action or that standing to intervene has not been established under Article III, Section 2 of the Constitution.

The intervention of the Senate is timely and would not delay the pending action. The action was filed on January 4, 1984, and the Court has set argument for February 22, 1984. The Senate is filing with this motion to intervene a complaint in intervention and a motion for summary judgment. There are no facts in dispute. The defendants will have time under the rules of procedure to respond to the motion for summary judgment, and the Senate will have time to reply, without disturbing the argument date which the Court has established.

The Senate has Article III standing to intervene. The Senate and the House were granted leave to intervene in *Immigration and Naturalization Service v. Chadha*, 103 S.Ct. 2764, 2773 note 5, 2778 (1983), which also involved the procedures for exercising legislative power under Article I, Section 7 of the Constitution. The Senate passed H.R. 4042, 129 Cong. Rec. S16468 (daily ed. Part II, Nov. 17, 1983), and has a direct constitutional interest in the efficacy of its legislative action. *Kennedy v. Sampson*, 511 F.2d 430, 434-35 (D.C. Cir. 1974) (referring to concession by executive branch that Senate has standing to challenge constitutionality of presidential pocket veto). The appearance of the Senate as a party makes this interbranch dispute particularly suitable for adjudication. See *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Justice Powell, concurring).

For these reasons, the motion of the United States Senate to intervene should be granted.

Respectfully submitted,

/s/ Michael Davidson

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Counsel for United States Senate

Dated: January 27, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

AND UNITED STATES SENATE,
APPLICANT IN INTERVENTION

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

Judge Jackson

COMPLAINT OF INTERVENOR FOR DECLARATORY RELIEF

The United States Senate, applicant in intervention, by its Counsel, alleges:

JURISDICTION AND VENUE

1. This action arises under Article I, Section 7, Clause 2 of the United States Constitution and 1 U.S.C. §§ 106a, 112, and 113 (1982). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 2201 (1976).

2. Venue in this Court is proper under 28 U.S.C. § 1391 (1976).

INTERVENOR

3. The United States Senate passed H.R. 4042, 98th Congress, and caused it to be enrolled and signed and

returned to the House of Representatives for presentation to the President, pursuant to Article I, Section 7, Clause 2, of the United States Constitution.

DEFENDANTS

4. Defendant Ronald Geisler is the Executive Clerk for the White House Office. He failed to deliver H. R. 4042 to the Administrator of General Services even though the President had not returned H. R. 4042 to the House of Representatives with his objections within ten days (Sundays excepted) of its presentment to him.

5. Defendant Gerald P. Carmen is the Administrator of General Services. He has failed to publish H. R. 4042 as a slip law or in the Statutes at Large of the United States.

FACTS

6. The House of Representatives passed H. R. 4042 on September 30, 1983.

7. The Senate passed H. R. 4042 without amendment on November 17, 1983.

8. The Speaker of the House signed H. R. 4042 on November 18, 1983.

9. The President Pro Tempore of the Senate signed H. R. 4042 on November 18, 1983.

10. The Committee on House Administration of the House of Representatives presented H. R. 4042 to the President on November 18, 1983.

11. The Ninety-eighth Congress adjourned its first session on November 18, 1983, and, by joint resolution, established January 23, 1984, as the date of the commencement of its second session.

11. The Clerk of the House of Representatives is authorized to receive messages from the President at any time that the House is not in session.

12. The President neither signed H. R. 4042 nor returned it to the House of Representatives on or before November 30, 1983, but on that date he announced that he was withholding his approval of the bill.

13. The Executive Clerk of the White House did not deliver H. R. 4042 to the Administrator for General Services.

14. The Administrator of General Services has not published H. R. 4042 as a public law of the United States.

15. The Ninety-eighth Congress convened its second session on January 23, 1984.

STATEMENT OF THE CLAIM

16. Under Article I, Section 7, Clause 2, of the United States Constitution, H. R. 4042 became law when the President did not return it to the House of Representatives with his objections within ten days (Sundays excepted) of its presentment to him.

17. The failure of the defendant Executive Clerk for the White House to deliver H. R. 4042 to the Administrator of General Services is a violation of 1 U.S.C. § 106a (1982).

18. The failure of the defendant Administrator of General Services to receive H. R. 4042 from the Executive Clerk for the White House is a violation of 1 U.S.C. § 106a (1982).

19. The failure of the defendant Administrator of General Services to publish H. R. 4042 as a slip law and in the United States Statutes at Large is a violation of 1 U.S.C. §§ 112, 113 (1982).

20. These constitutional and statutory violations of defendants have deprived the intervenor United States Senate of its constitutional role in the enactment of legislation and have nullified the votes of members of the United States Senate for the passage of H. R. 4042.

RELIEF

WHEREFORE INTERVENOR PRAYS:

A. That this Court declare that H. R. 4042, 98th Congress, is a duly enacted public law of the United States and that the defendants are under a duty to have H. R. 4042 delivered and published as a slip law and in the United States Statutes at Large.

B. That this Court award such other and further relief as may be just and equitable.

Respectfully submitted,

/s/ Michael Davidson

MICHAEL DAVIDSON
Senate Legal Counsel

M. ELIZABETH CULBRETH
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Counsel for United States Senate

Dated: January 27, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE GENERAL SERVICES
ADMINISTRATION, AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants, through their undersigned attorneys, hereby move the Court pursuant to Rule 65, Fed. R. Civ. Pro., for the entry of summary judgment in their favor on the grounds there are no triable issues of material fact and the defendants are entitled to judgment as a matter of law. This motion is supported by the accompanying memorandum of points and authorities, the Declaration of Ronald R. Geisler and a statement of material facts as to which there is no genuine issue.

Respectfully submitted,

/s/ Richard Willard

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Acting Assistant Attorney
General, Civil Division

JOSEPH E. DEGENOVA
United States Attorney

/s/ David J. Anderson

DAVID J. ANDERSON

/s/ Judith F. Ledbetter

JUDITH F. LEDBETTER

/s/ Janet M. McClintock

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Attorneys for defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE GENERAL SERVICES
ADMINISTRATION, AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS.

DEFENDANTS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

1. On November 18, 1983, H.R. 4042 was presented to the President for his approval. Geisler Decl. ¶2.
2. On November 18, 1983, both houses of the 98th Congress completed the business of their first session and adjourned *sine die*. H. Con. Res. 221; 129 Cong. Rec. S16779, S16858, S17192-3, H10469 (daily ed. Nov. 16, 1983); 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983).
3. Neither at the end of the first session of the 98th Congress, nor at any other time during this adjournment, did the House of Representatives formally notify the President by letter or resolution that an agent had been appointed to receive messages from him and, in particular, to receive vetoed bills with his objections to them. Geisler Decl. ¶4.

4. The President's ten days (Sundays excepted) for approving H.R. 4042 expired on November 30, 1983.

5. On November 30, 1983, the White House issued a statement announcing that the President was withholding his approval from H.R. 4042. 19 Weekly Comp. Pres. Doc. 1627-28 (Nov. 30, 1983).

6. The President did not return H.R. 4042, with his objections to the House of Representatives, where it had originated. Geisler Decl. ¶3.

7. The 98th Congress convened its second session on January 23, 1984. 130 Cong. Rec. S1, H1 (daily ed. Jan. 23, 1984).

Respectfully submitted,

/s/ Richard K. Willard

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General, Civil Division

JOSEPH E. DEGENOVA
United States Attorney

/s/ David J. Anderson

DAVID J. ANDERSON

/s/ Judith F. Ledbetter

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Attorneys for defendants.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR OF THE GENERAL SERVICES
ADMINISTRATION; AND RONALD GEISLER, INDIVIDUALLY AND
IN HIS CAPACITY AS THE EXECUTIVE CLERK OF THE
WHITE HOUSE,
DEFENDANTS.

DECLARATION OF RONALD R. GEISLER

I, Ronald R. Geisler, do hereby depose and say:

1. I am the Executive Clerk of the White House, a position I have held since January 1982. In addition, I have been on the staff of this office since 1965. In my official capacity I am responsible for receiving all bills and resolutions sent by the Congress to the President and for delivering messages from the President to the Congress. Part of my duties includes accepting bills presented to the President, keeping records of the exact disposition of such bills, and delivering veto messages to the Congress. In connection with these duties I have ascertained the following:

2. On November 18, 1983, H.R. 4042 was presented to President Reagan for his consideration.

3. President Reagan did not return H.R. 4042 with his objections to the House of Representatives, the House from which the bill originated.

4. Neither at the end of the first session of the 98th Congress, nor at any other time during this adjournment, did the House of Representatives formally notify the President by letter or resolution that agents had been appointed to receive messages from him, and, in particular, to receive vetoed bills, with his objections to them.

5. Part of my duties includes maintaining records kept by past Executive Clerks and keeping accurate records of all bills presented to the President and their disposition. Based upon a review of those records I have ascertained the following:

a. Appendix I to the Points and Authorities in Support of Defendant's Motion for Summary Judgment and in Opposition to the Plaintiff's Motion for a Preliminary and Permanent Injunction contains an accurate listing of the vetoes exercised by Presidents Reagan and Carter;

b. President Carter returned S. 2096, "An Act to provide for a study by the Secretary of Health, Education, and Welfare of the long-term health effects in humans of exposure to dioxins," to the Secretary of the Senate on January 2, 1980, after the Senate had adjourned its first session of the 96th Congress, but while the House was still in session;

c. President Reagan pocket vetoed H.R. 4353, "An Act to amend the Act entitled 'An Act to establish a uniform Law on the Subject of Bankruptcies', approved November 6, 1978," on December 30, 1981 during an intersession adjournment between the first and second sessions of the 97th Congress.

6. It is part of my duties to physically deliver a veto message from the President to the floor of the House or Senate while it is in session. To deliver the veto message I, or member of my staff, must go directly to the floor and ask the Doorkeeper of the House of Representatives or the Secretary for the Majority of the Senate, to an-

nounce my presence to the Speaker of the House or the President of the Senate, respectively. Upon receiving recognition of the chair, I announce:

Mr. Speaker (Mr. President), I am directed by the President of the United States to deliver to the House of Representatives (Senate) a message in writing.

I hand the Doorkeeper or Secretary the veto message which, together with the bill, is contained in an envelope sealed with the Presidential seal. He then carries it to the dias where the envelope is opened and the message is read aloud by a reading clerk. If I am unable to deliver the message as outlined above, my deputy, Daniel Marks, or assistants, Douglas Chirdon or G. Timothy Saunders, the three other persons within the Executive Clerk's Office with floor privileges, will deliver the message.

I declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge.

DATED: January 30, 1984

/s/ Ronald R. Geisler
RONALD R. GEISLER

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 84-00020

MICHAEL D. BARNES, INDIVIDUALLY/MEMBER;
U.S. HOUSE OF REPRESENTATIVES, ET AL.,
APPELLANT

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR, GENERAL SERVICES
ADMINISTRATION, ET AL.

September Term, 1983

Filed Jan. 30, 1984

BEFORE: Tamm, Wilkey and Scalia, Circuit Judges

ORDER

On consideration of Appellants' motion to dismiss appeal, it is

ORDERED by the Court that the aforesaid motion is granted and the above appeal is hereby dismissed.

The Clerk is directed to send a certified copy of this order to the District Court.

Per Curiam

For The Court:

GEORGE A. FISHER, *Clerk*

By: /s/ Daniel M. Cathey

DANIEL M. CATHEY
First Deputy Clerk

Circuit Judge Tamm did not participate in this Order.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, ET AL.,
PLAINTIFFS,

AND UNITED STATES SENATE,
INTERVENOR,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

Filed Feb. 1, 1984

ORDER

Upon consideration of the motion of the United States Senate to intervene and the entire record in this case, it is this 31st day of January, 1984.

ORDERED That the motion to intervene be and it is hereby granted.

/s/ Thomas P. Jackson

THE HONORABLE THOMAS P. JACKSON
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

and

UNITED STATES SENATE,
APPLICANT IN INTERVENTION,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

JUDGE JACKSON

INTERVENOR'S MOTION FOR SUMMARY JUDGMENT

Intervenor, the United States Senate, by its undersigned counsel, hereby moves, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for entry of summary judgment. Pursuant to Local Rule 1-9(b), (h), this motion is accompanied by a statement of material facts not in genuine issue and a memorandum of points and authorities. These documents demonstrate that there are no disputed material facts and that the intervenor is entitled to entry of judgment as a pure matter of law.

Respectfully submitted,

/s/ Michael Davidson
 MICHAEL DAVIDSON
Senate Legal Counsel
 M. ELIZABETH CULBRETH
Deputy Senate Legal Counsel
 MORGAN J. FRANKEL
Assistant Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435
Counsel for United States Senate

Dated: January 27, 1984

UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
 PLAINTIFFS,

and

UNITED STATES SENATE,
 APPLICANT IN INTERVENTION,

v.

GERALD P. CARMEN, ETC., ET AL.,
 DEFENDANTS.

JUDGE JACKSON

INTERVENOR'S STATEMENT OF MATERIAL FACTS AS TO
 WHICH THERE IS NO GENUINE ISSUE

1. The House of Representatives passed H.R. 4042 on September 30, 1983. 120 Cong. Rec. H7777 (daily ed. Sept. 30, 1983).
2. The Senate passed H.R. 4042 without amendment on November 17, 1983. 129 Cong. Rec. S16468 (daily ed. Nov. 17, 1983).
3. The Ninety-eighth Congress adjourned its first session on November 18, 1983, and, by joint resolution, established January 23, 1984, as the date of the commencement of its second session. H. Con. Res. 221, H.J. Res. 421, 98th Cong., 1st Sess. (1983); 129 Cong. Rec. S16779 (daily ed. Part I, Nov. 18, 1983); 129 Cong. Rec. H10469 (daily ed. Part I, Nov. 18, 1983).
4. The Speaker of the House signed H.R. 4042 on November 18, 1983. 129 Cong. Rec. H10469 (daily ed. Part I, Nov. 18, 1983).

5. The President Pro Tempore of the Senate signed H.R. 4042 on November 18, 1983. 129 Cong. Rec. S16948 (daily ed. Part II, Nov. 18, 1983).

6. The Committee on House Administration of the House of Representatives presented H.R. 4042 to the President on November 18, 1983. 129 Cong. Rec. H10663 (daily ed. Dec. 14, 1983).

7. The House of Representatives has authorized the Clerk of the House to receive messages from the President at any time that the House is not in session. Rule III, Clause 5 of the Rules of the House of Representatives; 129 Cong. Rec. H22 (daily ed. Jan. 3, 1983).

8. The President neither signed H.R. 4042 nor returned it to the House of Representatives on or before November 30, 1983, but on that date he announced that he was withholding his approval of the bill. 19 Weekly Comp. of Pres. Doc. 1627 (Nov. 30, 1983).

9. The Executive Clerk of the White House did not deliver H.R. 4042 to the Administrator of General Services.

10. The Administrator of General Services has not published H.R. 4042 as a public law of the United States.

11. The Ninety-eighth Congress convened its second session on January 23, 1984. 130 Cong. Rec. S1 (daily ed. Jan. 23, 1984); 130 Cong. Rec. H1 (daily ed. Jan. 23, 1984).

Respectfully submitted,

/s/ Michael Davidson

MICHAEL DAVIDSON

Senate Legal Counsel

M. ELIZABETH CULBRETH

Deputy Senate Legal Counsel

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Counsel for United States Senate

Dated: January 27, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,

AND UNITED STATES SENATE,
INTERVENOR,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR, GENERAL SERVICES
ADMINISTRATION, ET AL.,
DEFENDANTS.

Judge Jackson

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Michael D. Barnes, *et al.*, by their undersigned counsel, hereby move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for entry of summary judgment. Pursuant to Local Rule 1-9(b), (h), this motion is accompanied by a Statement of Material Facts Not in Genuine Issue and a Memorandum of Points and Authorities. These documents demonstrate that there are no disputed material facts and that the plaintiffs are entitled to entry of judgment as a matter of law.

Respectfully submitted,

MICHAEL RATNER
MARGARET RATNER
ANNE E. SIMON
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MORTON STAVIS
PETER WEISS

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Counsel for plaintiffs
MICHAEL D. BARNES, *et al.*

New York, New York
February 5, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,

AND UNITED STATES SENATE,
INTERVENOR,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR, GENERAL SERVICES
ADMINISTRATION, ET AL.,
DEFENDANTS.

Judge Jackson

PLAINTIFFS' STATEMENT OF MATERIAL FACTS AS TO
WHICH THERE IS NO GENUINE ISSUE

1. The House of Representatives passed H.R. 4042 on September 30, 1983. 129 Cong. Rec. H7777 (daily ed. Sept. 30, 1983).

2. Plaintiffs Michael D. Barnes, Gary Ackerman, Howard Berman, John Conyers, Ronald V. Dellums, Mervyn Dymally, Dennis Eckart, Robert Edgar, Vic Fazio, Ed Feighan, Barney Frank, Robert Garcia, Samuel Gejdenson, Peter Kostmeyer, Mickey Leland, Mel Levine, Robert Matsui, Matt McHugh, Edward Markey, Barbara A. Mikulski, Bruce Morrison, Mary Rose Oakar, James Oberstar, Richard Ottinger, Patricia Schroeder, Ferdinand St. Germain, Gerry Studds, Robert Torricelli, Bruce

Vento, Ted Weiss, and Howard Wolpe, all Members of Congress, on information and belief, voted in favor of H.R. 4042 on September 30, 1983.

3. The Senate passed H.R. 4042 without amendment on November 17, 1983. 129 Cong. Rec. S16468 (daily ed. Nov. 17, 1983).

4. The Ninety-eighth Congress adjourned its first session on November 18, 1983, and, by joint resolution, established January 23, 1984, as the date of the commencement of its second session. H. Con. Res. 221, H.J. Res. 421, 98th Cong., 1st sess. (1983); 129 Cong. Rec. S16779 (daily ed. Part I, Nov. 18, 1983); 129 Cong. Rec. H10469 (daily ed. Part I, Nov. 18, 1983).

5. The Speaker of the House signed H.R. 4042 on November 18, 1983. 129 Cong. Rec. H10469 (daily ed. Part I, Nov. 18, 1983).

6. The President Pro Tempore of the Senate signed H.R. 4042 on November 18, 1983. 129 Cong. Rec. S16948 (daily ed. Part II, Nov. 18, 1983).

7. The Committee on House Administration of the House of Representatives presented H.R. 4042 to the President on November 18, 1983. 129 Cong. Rec. H10663 (daily ed. Dec. 14, 1983).

8. The House of Representatives has authorized the Clerk of the House to receive messages from the President at any time that the House is not in session. Rule III, Clause 5 of the Rules of the House of Representatives; 129 Cong. Rec. H22 (daily ed. Jan. 3, 1983).

9. The President neither signed H.R. 4042 nor returned it to the House of Representatives on or before November 30, 1983, but on that date he announced that he was withholding his approval of the bill. 19 Weekly Comp. of Pres. Doc. 1627 (Nov. 30, 1983).

10. The Executive Clerk of the White House did not deliver H.R. 4042 to the Administrator of General Services.

11. The Administrator of General Services has not published H.R. 4042 as a public law of the United States.

12. The Ninety-eighth Congress convened its second session on January 23, 1984. 130 Cong. Rec. S1 (daily ed. Jan. 23, 1984); 130 Cong. Rec. H1 (daily ed. Jan. 23, 1984).

Respectfully submitted,

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Counsel for plaintiffs
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New York, New York
February 5, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, INDIVIDUALLY AND IN HIS CAPACITY AS
A MEMBER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES, ET AL.,
PLAINTIFFS,
AND UNITED STATES SENATE,
INTERVENOR,

v.

GERALD P. CARMEN, INDIVIDUALLY AND IN HIS CAPACITY AS
ADMINISTRATOR, GENERAL SERVICES
ADMINISTRATION, ET AL.,
DEFENDANTS.

Feb. 10, 1984

Judge Jackson

DECLARATION OF MICHAEL RATNER IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT

MICHAEL D. RATNER hereby declares under penalty of perjury:

1. I am one of the attorneys for plaintiffs in this action, and make this declaration in support of plaintiffs' motion for summary judgment and in opposition to defendants' motion for summary judgment.

2. Annexed hereto is the original of an affidavit executed by Plaintiff Michael D. Barnes on January 3, 1984, stating that he voted in favor of H.R. 4042 on September 30, 1983.

3. Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue adds only one paragraph to the Statement of Material Facts filed by the United States Senate. That paragraph, Number 2, recites the list of plaintiffs who voted in favor of H.R. 4042. Plaintiffs' motion should, therefore, cause no delay in these proceedings.

4. However, plaintiffs believe that defendants' Statement of Material Facts omits certain material facts, and contains facts which are not material and may be misleading.

5. Defendants' Statement omits that both the House of Representatives and the Senate passed H.R. 4042, and that both the Speaker of the House and the President Pro Tempore of the Senate signed H.R. 4042 on November 18, 1983.

6. Defendants also omit the fact that under Rule III, cl. 5 of the Rules of the House of Representatives the House has authorized the Clerk of the House to receive messages from the President at any time that the House is not in session. *See* Intervenor's and Plaintiffs' Statement. As is explained in plaintiffs' brief and reply, this is clearly a material fact.

7. Defendants claim that it is a material fact that the "House of Representatives [did not] formally notify the President by letter or resolution that an agent had been appointed to receive messages from him and, in particular, to receive vetoed bills with his objections to them." *See* Defendants' Statement No. 3. As is demonstrated in both plaintiffs' brief, reply brief, and intervenors' brief, there is no legal requirement in the present circumstances for the House to "formally notify" the President that the Clerk can receive messages from him.

8. Defendants' "Statement" No. 2 may be misleading. It states that both houses of the 98th Congress "completed the business of their first session. . . ." As is well known,

the business from the first session of Congress carries over to the second session. Rule XXVI and Annotation, Rules of the House of Representatives. If by this paragraph defendants imply that there is an end to business of the first session, this paragraph is inaccurate.

9. For the reasons expressed above, as well as those in the accompanying brief, plaintiffs believe that their Statement of Material Facts, and not defendants', should be accepted.

10. I declare under penalty of perjury that the foregoing is true and correct.

MICHAEL RATNER

New York, New York
February 5, 1984

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, ET AL.,
DEFENDANTS.

AFFIDAVIT

COMES NOW the undersigned, MICHAEL D. BARNES, and on oath, deposes and states as follows:

1. That I am the member of the United States Congress from the Eighth Congressional District of Maryland.
2. That I was on the floor of the United States Congress on September 30, 1983, and at that time voted in favor of H.R. 4042.

I HEREBY CERTIFY under the penalties of perjury that the foregoing statements of fact are true and correct based upon my own personal knowledge, information and belief, and that I am competent to testify thereto.

/s/ Michael Barnes
MICHAEL D. BARNES

STATE OF MARYLAND:
COUNTY OF MONTGOMERY to wit:

SUBSCRIBED and sworn to before me this 3rd day of January 1984.

/s/ Michael Henry, Jr.
Notary Public

My Commission Expires: June 30, 1987

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

AND

UNITED STATES SENATE, INTERVENOR,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

JUDGE JACKSON

INTERVENOR'S STATEMENT OF GENUINE ISSUE

Contrary to defendants' assertion, Defendants' Statement of Material Facts ¶3, the Court may take judicial notice of the fact that the President was formally notified at the beginning of the first session of the Ninety-eighth Congress that the Clerk of the House of Representatives was authorized to receive messages from the President at any time that the House was not in session. 44 U.S.C. § 906 (1976) (President furnished with copies of Congressional Record for use of Executive Office); 129 Cong. Rec. H 22 (daily ed. Jan. 3, 1983) (House of Representatives adopted House Rule III, Clause 5).

Respectfully submitted,

/s/ Michael Davidson

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Dated: February 8, 1984

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

**MOTION OF THE HONORABLE THOMAS P. O'NEILL, JR.,
SPEAKER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES; THE HONORABLE JIM WRIGHT,
MAJORITY LEADER OF THE UNITED STATES HOUSE OF
REPRESENTATIVES; THE HONORABLE ROBERT H.
MICHEL, MINORITY LEADER OF THE UNITED STATES
HOUSE OF REPRESENTATIVES; THE HONORABLE
THOMAS S. FOLEY, MAJORITY WHIP OF THE UNITED
STATES HOUSE OF REPRESENTATIVES; AND THE
HONORABLE TRENT LOTT, MINORITY WHIP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES, TO
INTERVENE**

Movants, the Speaker, and the bipartisan elected leadership of the United States House of Representatives, hereby move for leave to intervene as a Plaintiff in this action pursuant to Rule 24(a) and (b), Federal Rules of Civil Procedure, for the purpose of seeking declaratory and injunctive relief against the Defendants. Movants further seek to intervene to assert that, pursuant to the operation of Article I, Section 7, clause 2 of the United States Constitution, that the bill, H.R. 4042 of the 98th Congress, has become a duly enacted public law.

In support of this motion, the movants refer the Court to the attached Memorandum of Points and Authorities.

Respectfully submitted,

/s/ Steven R. Ross

STEVEN R. ROSS

General Counsel to the Clerk

/s/ Michael L. Murray

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IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

INTERVENORS

THE HONORABLE THOMAS P. O'NEILL, JR., SPEAKER;
THE HONORABLE JIM WRIGHT, MAJORITY LEADER; THE
HONORABLE ROBERT H. MICHEL, REPUBLICAN LEADER;
THE HONORABLE THOMAS S. FOLEY, MAJORITY WHIP;
THE HONORABLE TRENT LOTT, MINORITY WHIP,
COMPLAINT

The Speaker and elected bipartisan leadership of the United States House of Representatives, applicants in intervention, by the undersigned counsel, allege:

JURISDICTION AND VENUE

1. This action arises under Article I, Section 7, Clause 2 of the United States Constitution and 1 U.S.C. §§ 106a, 112, and 113 (1982). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 2201 (1976).

2. Venue in this Court is proper under 28 U.S.C. § 1391 (1976).

3. The Speaker and elected bipartisan leadership of the United States House of Representatives passed H.R. 4042, 98th Congress, and caused it to be enrolled and signed and presented to the President, pursuant to Article I, Section 7, Clause 2 of the United States Constitution.

DEFENDANTS

4. Defendant Ronald Geisler is the Executive Clerk for the White House Office. He failed to deliver H.R. 4042 to the Administrator of General Services even though the President had not returned H.R. 4042 to the House of Representatives with his objections within ten days (Sundays excepted) of its presentment to him.

5. Defendant Gerald P. Carmen is the Administrator of General Services. He has failed to publish H.R. 4042 as a slip law or in the Statutes at Large of the United States.

FACTS

6. The House of Representatives adopted the Rules of the House of Representatives, including Rule III, clause 5 for the 98th Congress on January 3, 1983. 129 *Cong. Rec. H 22* (daily ed., January 3, 1983).

7. The House of Representatives passed H.R. 4042 on September 30, 1983.

8. The Senate passed H.R. 4042 without amendment on November 17, 1983.

9. Intervenor, the Speaker of the House, signed H.R. 4042 on November 18, 1983.

10. The President Pro Tempore of the Senate signed H.R. 4042 on November 18, 1983.

11. The Committee on House Administration of the House of Representatives, of which Intervenor Thomas S. Foley is a member, presented H.R. 4042 to the President on November 18, 1983.

12. The Ninety-Eighth Congress adjourned its First Session on November 18, 1983, and, by joint resolution, established January 23, 1984, as the date of the commencement of its Second Session.

13. The Clerk of the House of Representatives is, pursuant to Rule III, Clause 5 of the Rules of the House, authorized to receive messages from the President at any time that the House is not in session.

14. The President neither signed H.R. 4042, nor returned it to the House of Representatives on or before November 30, 1983, but on that date he announced that he was withholding his approval of the bill.

15. The Executive Clerk of the White House did not deliver H.R. 4042 to the Administrator of General Services.

16. The Administrator of General Services has not published H.R. 4042 as a public law of the United States.

17. On Wednesday, December 14, 1983, the Clerk of the House received a message to the House from the President under the Impoundment Control Act of 1974, transmitted pursuant to 2 U.S.C. § 685(a). 130 *Cong. Rec. H 3* (daily ed., January 23, 1984).

18. On Wednesday, December 21, 1983, the Clerk of the House received a message to the House from the President under the Impoundment Control Act of 1974, transmitted pursuant to 2 U.S.C. § 685(a). 130 *Cong. Rec. H 3* (daily ed., January 23, 1984).

19. On Thursday, January 12, 1984, the Clerk of the House received a message to the House from the President under the Impoundment Control Act of 1974, transmitted pursuant to 2 U.S.C. § 685(a). 130 *Cong. Rec. H 3* (daily ed., January 23, 1984).

20. The Ninety-Eighth Congress convened its Second Session on January 23, 1984.

21. On January 23, 1984, the Speaker laid before the House a letter from the Clerk of the House which detailed the date and time of his receipt of the three Presidential messages referred to in paragraphs 17, 18, and 19 above.

STATEMENT OF THE CLAIM

22. Under Article I, Section 7, clause 2 of the United States Constitution, H.R. 4042 became law when the President did not return it to the House of Representatives with his objections within ten days (Sundays excepted) of its presentment to him.

23. The failure of the defendant Executive Clerk for the White House to deliver H.R. 4042 to the Administrator of General Services is a violation of 1 U.S.C. § 106a (1982).

24. The failure of defendant Administrator of General Services to receive H.R. 4042 from the Executive Clerk for the White House is a violation of 1 U.S.C. § 106a (1982).

25. The failure of the defendant Administrator of General Services to publish H.R. 4042 as a slip law and in the United States Statutes at Large is a violation of 1 U.S.C. §§ 112, 113 (1982).

26. These constitutional and statutory violations of defendants have deprived the intervenors and the United States House of Representatives of their constitutional role in the enactment of legislation.

RELIEF

A. That this Court declare that H.R. 4042, 98th Congress, is a duly enacted public law of the United States and that the defendants are under a duty to have H.R. 4042 delivered and published as a slip law and in the United States Statutes at large.

B. That this Court award such other and further relief as may be just and equitable.

Respectfully submitted,

/s/ Steven R. Ross

STEVEN R. ROSS

General Counsel to the Clerk

/s/ Michael L. Murray

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Intervenors, the Speaker, and elected bipartisan leadership of the United States House of Representatives, by the undersigned counsel, hereby move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for entry of summary judgment. Pursuant to Local Rules 1-9(b), (h), this motion is accompanied by a statement of material facts not in genuine issue and a memorandum of points and authorities. These documents demonstrate that there are no disputed material facts and that the intervenor is entitled to entry of judgment as a pure matter of law.

Respectfully submitted,

/s/ Steven R. Ross

STEVEN R. ROSS

General Counsel to the Clerk

/s/ Michael L. Murray

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0020

MICHAEL D. BARNES, ETC., ET AL.,
PLAINTIFFS,

v.

GERALD P. CARMEN, ETC., ET AL.,
DEFENDANTS.

INTERVENORS' STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE

1. The House of Representatives adopted the Rules of the House for the 98th Congress, including Rule III, clause 5, on January 3, 1983. 129 Cong. Rec., H22 (daily ed., January 3, 1983).
2. The House of Representatives passed H.R. 4042 on September 30, 1983. 129 Cong. Rec. H7777 (daily ed. September 30, 1983).
3. The Senate passed H.R. 4042 without amendment on November 17, 1983. 129 Cong. Rec. S16468 (daily ed. November 17, 1983).
4. The Ninety-Eighth Congress conditionally adjourned its First Session on November 18, 1983, and, by joint resolution, established January 23, 1984, as the date of the commencement of its Second Session. H. Con. Res. 221, Res. 421, 9th Cong., 1st Sess. (1983); 129 *Cong. Rec.* S16779 (daily ed., Part I, November 18, 1983).
5. Intervenor, the Speaker of the House, signed H.R. 4042 on November 18, 1983. 129 Cong. Rec. H10469 (daily ed., Part I, November 18, 1983).

6. The President Pro Tempore of the Senate signed H.R. 4042 on November 18, 1983. 129 Cong. Rec. S16948 (daily ed., Part II, November 18, 1983).

7. The Committee on House Administration of the House of Representatives, of which intervenor Thomas S. Foley is a member, presented H.R. 4042 to the President on November 18, 1983. 129 Cong. Rec. H10663 (daily ed., December 14, 1983).

8. The House of Representatives has authorized the Clerk of the House to receive messages from the President at any time that the House is not in session. Rule III, clause 5 of the Rules of the House of Representatives; 129 Cong. Rec. H22 (daily ed., January 3, 1983).

9. The President neither signed H.R. 4042, nor returned it to the House of Representatives on or before November 30, 1983, but on that date he announced that he was withholding his approval of the bill. 19 *Weekly Comp. of Pres. Doc.* 1627 (November 30, 1983).

10. The Executive Clerk of the White House did not deliver H.R. 4042 to the Administrator of General Services.

11. The President has returned several bills with objections to the House during an adjournment by delivering a message to the Clerk of the House. 128 *Cong. Rec.* H3972 (daily ed., June 28, 1982); 129 Cong. Rec. H8471-8472 (daily ed., October 20, 1983); 128 *Cong. Rec.* H3130 (daily ed., June 2, 1982); 128 Cong. Rec. H3984 (daily ed., July 12, 1982); 128 Cong. Rec. H6743 (daily ed., September 8, 1982); 128 Cong. Rec. H8515 (daily ed., November 29, 1982); 129 Cong. Rec. H6690-1 (daily ed., September 12, 1983).

12. On Wednesday, December 14, 1983, the Clerk of the House received a message to the House from the President under the Impoundment Control Act of 1974, transmitted pursuant to 2 U.S.C. § 685(a). 130 Cong. Rec. H3 (daily ed., January 23, 1984).

13. On Wednesday, December 21, 1983, the Clerk of the House received a message to the House from the President under the Impoundment Control Act of 1974, transmitted pursuant to 2 U.S.C. § 685(a). 130 Cong. Rec. H3 (daily ed., January 23, 1984).

14. On Thursday, January 12, 1984, the Clerk of the House received a message to the House from the President under the Impoundment Control Act of 1974, transmitted pursuant to 2 U.S.C. § 685(a). 130 Cong. Rec. H3 (daily ed., January 23, 1984).

15. The Ninety-Eighth Congress convened its Second Session on January 23, 1984. 130 Cong. Rec. S1 (daily ed., January 23, 1984); 130 Cong. Rec. H1 (daily ed., January 23, 1984).

16. On January 23, 1984, the Speaker laid before the House a letter from the Clerk which detailed the date and the time of his receipt of three Presidential messages referred to in paragraphs 11, 12, and 13 above. 130 Cong. Rec. H3 (daily ed., January 23, 1984).

Respectfully submitted,

/s/ Steven R. Ross

STEVEN R. ROSS

General Counsel to the Clerk

/s/ Michael L. Murray

MICHAEL L. MURRAY

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Supreme Court of the United States

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE
UNITED STATES AND RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ORDER ALLOWING CERTIORARI.

Filed March 3, 1986.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

①
No. 85-781

Supreme Court, U.S.

FILED

JUN 20 1985

JOSEPH T. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF
THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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64pp

QUESTIONS PRESENTED

1. Whether the passage of the expiration date specified in a bill renders moot this case concerning whether the bill became a law.

2. Whether individual Members of Congress, the Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives have standing to bring this action against Executive Branch officials to establish that a bill from which the President has withheld his approval in reliance upon the "Pocket Veto" Clause of the Constitution (Art. I, § 7, Cl. 2), became a law.

3. Whether the "Pocket Veto" Clause, which provides that a bill not signed by the President within ten days (Sundays excepted) does not become a law if "Congress by their Adjournment prevent its Return," applies when, on the tenth day after presentment of the bill, Congress has adjourned the First Session of a Congress sine die.

PARTIES TO THE PROCEEDING

The appellees in the court of appeals were Ray Kline, Acting Administrator of General Services, and Ronald Geisler, Executive Clerk of the White House. Effective April 1, 1985, responsibility for publishing the Statutes at Large and preserving the laws of the United States was transferred from the Administrator of General Services to the Archivist of the United States. National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291, 1 U.S.C. (Supp. II) 106a, 112. Accordingly, Frank G. Burke, Acting Archivist of the United States, has been substituted for the Acting Administrator of General Services.

The appellants in the court of appeals were the plaintiffs and intervenors in the district court. The plaintiffs were 33 members of the House of Representatives: Michael D. Barnes, Gary Ackerman, Howard Berman, John Conyers, Ronald V. Dellums, Mervyn Dymally, Dennis Eckart, Robert W. Edgar, Vic Fazio, Ed Feighan, Barney Frank, Robert Garcia, Samuel Gejdenson, Peter Kostmeyer, Mickey Leland, Mel Levine, Robert Matsui, Matt McHugh, Edward J. Markey, Barbara A. Mikulski, George Miller, Bruce Morrison, Mary Rose Oakar, James L. Oberstar, Richard L. Ottinger, Patricia Schroeder, Paul Simon, Ferdinand St. Germain, Gerry Studds, Robert Torricelli, Bruce Vento, Ted Weiss, and Howard Wolpe. The intervenors were the United States Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives: Thomas P. O'Neill, Jr., Jim Wright, Robert H. Michel, Thomas S. Foley, and Trent Lott.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, AND RONALD GEISLER, EXECUTIVE CLERK OF
THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-118a) is reported at 759 F.2d 21. The memorandum of the district court (Pet. App. 119a-132a) is reported at 582 F. Supp. 163.

JURISDICTION

The judgment of the court of appeals (Pet. App. 137a-138a) was entered on August 29, 1984, and a petition for rehearing was denied on August 7, 1985 (Pet. App. 133a-134a). The petition for a writ of certiorari was filed on November 5, 1985, and was granted on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS AND BILL INVOLVED**

1. Article I, Section 5, Clause 4; Article I, Section 7, Clauses 2 and 3; and Article III, Section 2, Clause 3 of the Constitution are reproduced at App., *infra*, 1a-2a.

2. Section 728 of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1555, as amended by Pub. L. No. 97-233, 96 Stat. 260, and Pub. L. No. 98-53, 97 Stat. 287 (22 U.S.C. (& Supp. II) 2370 note) is reproduced at Pet. App. 141a-145a.

3. H.R. 4042, 98th Cong., 1st Sess. (1983), is reproduced at App., *infra*, 1a-2a.

STATEMENT

1. On November 18, 1983, a bill that had originated in the House of Representatives, H.R. 4042, 98th Cong., 1st Sess. (Pet. App. 141a), was presented to the President for his consideration pursuant to Article I, Section 7, Clause 2 of the Constitution (Pet. App. 4a-5a). The bill provided that, "until such time as the Congress enacts new legislation * * * or until September 30, 1984, whichever occurs first," the requirements of Section 728 of the International Security and Development Cooperation Act of 1981¹ "shall continue to apply" (Pet. App. 141a). Section 728, which had expired on September 30, 1983, conditioned United States military aid to El Salvador on semiannual certification by the President that El Salvador was achieving progress in protecting human rights (Pet. App. 4a n.6, 141a-145a).

On the day that H.R. 4042 was presented to the President, the Senate and the House of Representatives, by concurrent resolution, ended the First Session of the 98th Congress and adjourned sine die. Pet. App. 5a; H.R. Con. Res. 221, 98th Cong., 1st Sess. (1983); 129 Cong. Rec. S16779, S16858, H10469 (daily ed. Nov. 18, 1983). By a separate joint resolution, which was passed the same day and approved by the President as required by Section 2 of the Twentieth Amendment, Congress specified that the Second Session of the 98th Congress would commence on January 23, 1984, some nine weeks later. Pub. L. No. 98-179, § 2, 97 Stat. 1127; 129 Cong. Rec. H10105 (daily ed. Nov. 16, 1983); *id.* at S16858. During this

¹ Pub. L. No. 97-113, 95 Stat. 1555 (22 U.S.C. (& Supp. II) 2370 note) (Pet. App. 141a-145a).

period between the two Sessions, a standing rule of the House authorized the Clerk to "receive messages from the President and from the Senate at any time that the House is not in session." H.R. Rule III, Cl. 5, *reprinted in* H.R. Doc. 97-271, 97th Cong., 2d Sess. 318 (1983). The Senate conferred similar, temporary authority on its Secretary. 129 Cong. Rec. S17192-S17193 (daily ed. Nov. 18, 1983); Pet. App. 5a.

The President neither signed H.R. 4042 nor returned it to the House of Representatives with his objections. Instead, on November 30, 1983, the White House issued a statement announcing that the President had withheld his approval of H.R. 4042 (19 Weekly Comp. Pres. Doc. 1627). In the President's view, by operation of the "Pocket Veto" Clause of the Constitution (Art. I, § 7, Cl. 2), H.R. 4042 had not become a law because Congress was in adjournment on the tenth day (excluding Sundays) following presentment of the bill. Pet. App. 5a-6a.

2. On January 4, 1984, 33 Members of the House of Representatives filed this action in the United States District Court for the District of Columbia, seeking a declaration that H.R. 4042 had become a law and an injunction requiring petitioners to cause the bill to be published in the Statutes at Large (Pet. App. 6a, 120a; see J.A. 16-29).² The Senate and the Speaker and Bipartisan Leadership Group of the House of Representatives inter-

² The original defendants were petitioner Ronald Geisler, Executive Clerk of the White House (who delivers bills that have become laws to the appropriate official for publication), and Gerald P. Carmen, the then-Administrator of General Services (who at the time was charged with receiving, preserving and publishing all laws of the United States). See Pet. App. 119a-120a; 1 U.S.C. (Supp. II) 106a, 112. Ray Kline, the Acting Administrator of General Services, was later substituted for Carmen. Pet. App. 3a & n.4. In view of the transfer of relevant responsibilities to the Archivist of the United States (see National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (1 U.S.C. (Supp. II) 106a, 112)), Frank G. Burke, Acting Archivist of the United States, has been substituted for Kline as a petitioner. For simplicity, we include Burke's predecessors in our references to "petitioners."

vened in support of the plaintiffs (Pet. App. 2a-3a & n.3, 119a n.1) and, with them, are respondents here.

The district court granted summary judgment for petitioners and dismissed the complaint (Pet. App. 119a-132a). The district court concluded (*id.* at 130a) that it had no "license to depart from the only case directly in point," this Court's decision in *The Pocket Veto Case*, 279 U.S. 655 (1929), in which the question presented was "identical to the question presented by the instant case" (Pet. App. 126a). Accordingly, the court held that H.R. 4042 did not become law because, as in *The Pocket Veto Case*, the President withheld his approval of the bill following an adjournment sine die of the first session of a Congress (Pet. App. 130a-131a).

5. a. A divided panel of the court of appeals reversed (Pet. App. 1a-118a). The majority first held that, under circuit precedent, respondents had standing to bring this action (*id.* at 8a-18a). The court relied primarily on its decision in *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974), which held that a single Senator had standing to challenge a pocket veto on the ground that it had "nullified his original vote in favor of the legislation" (Pet. App. 8a). In the court's view, the individual Members of Congress in this case allege an identical injury (*id.* at 9a). The court also observed that the panel in *Kennedy v. Sampson* had stated that either House of Congress would have had standing based on the alleged injury to its participation in the lawmaking process resulting from the President's reliance on the Pocket Veto Clause (*ibid.*), and it held that, in this case, the Senate and Speaker and Bipartisan Leadership Group of the House have standing on the same theory (*ibid.*).³

Turning to the merits, the court of appeals held that Congress's adjournment sine die did not "prevent [the] Return" of H.R. 4042 within the meaning of the Pocket

³ Petitioners did not initially contest the standing of the Senate (Pet. App. 15a-17a & n.16). However, upon further consideration, petitioners argued in the supplemental petition for rehearing (at 7-10) that none of the respondents has standing.

Veto Clause because each House had authorized an agent to receive messages from the President following the adjournment (Pet. App. 20a). The court acknowledged this Court's conclusion in *The Pocket Veto Case* that an adjournment at the end of a session would prevent the President from returning a bill "even if" Congress had authorized an agent to receive messages (*id.* at 26a (quoting 279 U.S. at 684)). But the court believed that a different result was justified by the subsequent decision in *Wright v. United States*, 302 U.S. 583 (1938), which held that the President's actual veto of a bill was effective because he had delivered it with his objections to an agent of the originating House while that House alone was in a brief intrasession recess (Pet. App. 27a). Although *Wright* involved only a three-day recess, the court noted that it had relied on *Wright* in *Kennedy v. Sampson* to hold that "return is not prevented by an intrasession adjournment of any length * * * so long as the originating house arranged for receipt of veto messages" (*id.* at 30a). Based on its view that adjournments sine die at the end of the first session of a Congress "do not differ in any practical respect from * * * intrasession adjournments" (*id.* at 33a), the court extended *Kennedy v. Sampson* to all such "intersession" adjournments as well (*id.* at 38a).

b. In a lengthy dissent that did not reach the merits, Judge Bork concluded that respondents lack standing to bring this suit (Pet. App. 47a-118a). He perceived no distinction between suits alleging injury to the lawmaking powers of the House and Senate and suits seeking to require the President faithfully to execute a particular statute (*id.* at 56a-57a n.3): both raise "only a 'generalized grievance' about an allegedly unconstitutional operation of government" (*id.* at 65a). Judge Bork further concluded that the doctrine of congressional standing is inconsistent with this Court's teaching that "the law of Art. III standing is built on a single basic idea—the idea of separation of powers" (*id.* at 70a (quoting

Allen v. Wright, 468 U.S. 737, 752 (1984)), because it would lead to a centralization of power in the Judicial Branch to lay down prematurely the rules for the other Branches to follow (Pet. App. 76a-78a). Accordingly, Judge Bork concluded, a court should entertain a suit such as this only at the behest of "a private party who ha[s] a direct stake in the outcome," as in *The Pocket Veto Case* itself (*id.* at 64a).

4. The court of appeals entered its judgment on August 29, 1984, one month before the expiration date specified in H.R. 4042 (Pet. App. 137a-138a), but it did not issue its opinions until April 12, 1985 (see *id.* at 1a). Petitioners filed a supplemental petition for rehearing en banc on May 17, 1985 (see Pet. 9 & n.5), urging (in addition to arguments on standing and the merits) that the controversy became moot after September 30, 1984, because even if H.R. 4042 had become a law, the certification requirement would have expired on that date. On August 7, 1985, the court, with Judges Bork, Scalia, and Starr dissenting, denied the petition for rehearing en banc (Pet. App. 134a-136a).

SUMMARY OF ARGUMENT

I. This case is now moot, because, even if H.R. 4042 did become a law, the certification precondition it imposed on further military aid to El Salvador expired on September 30, 1984. Respondents attempt to avoid mootness by arguing that they are entitled even now to see H.R. 4042 published as a law in the Statutes at Large. However, publication is a consequence that is entirely collateral to the substantive constitutional question whether H.R. 4042 became a law and unrelated to respondents' role in the legislative process, which is the interest they sought to vindicate in this suit.

II. Respondents do not have standing to bring this suit. To recognize a right in Congress or its Members to invoke the power of the federal courts to resolve a wholly intragovernmental dispute with the Executive Branch would be inconsistent with the doctrine of separation of powers on which the law of standing is based. The in-

juries that respondents allege in this case—the "nullification" of their individual votes and the frustration of Congress's lawmaking powers as a result of the President's reliance on the Pocket Veto Clause—are merely restatements of respondents' abstract interest in obtaining what is essentially an advisory opinion. Moreover, just as Congress cannot overrule Executive action directly by means of a legislative veto, it cannot do so indirectly through the intermediary of the federal courts.

If the President had admitted that H.R. 4042 became a law but refused to enforce it, respondents clearly would not have standing to challenge that decision. Respondents' claim in this case is no different, because at bottom it is simply that the President failed to execute H.R. 4042. In the absence of a distinct and palpable injury, Members of Congress, like the members of the public they represent, have no standing based on a generalized grievance that the Executive has failed to follow the law. The Houses of Congress likewise do not have standing on the basis of their roles in the legislative process. The Pocket Veto Clause merely states one rule for determining when a bill becomes a law in the course of the interaction of the Legislative and Executive Branches in the lawmaking process. The failure of a bill to become a law by operation of that Clause therefore is not a "violation" of the Constitution that causes a judicially cognizable "injury" to Congress.

Nor do respondents have standing to enforce an alleged duty by petitioners to cause H.R. 4042 to be published in the Statutes at Large. In this regard, respondents assert no more than a generalized interest shared by all citizens in the public availability of laws. Moreover, the statutes imposing a duty on the Archivist to publish laws were never intended to be a vehicle for the litigation of the antecedent constitutional question of whether a particular bill in fact did become a law.

III. On the merits, this case is squarely controlled by the Court's unanimous decision in *The Pocket Veto Case*, 279 U.S. 655 (1929). There, the Court expressly held

that, by operation of the Pocket Veto Clause, the bill in question "did not become a law," because "the adjournment of the first session of the . . . Congress . . . prevented the President, within the meaning of the constitutional provision, from returning [the bill]" to be reconsidered by Congress (279 U.S. at 691-692). The court of appeals sought to avoid *The Pocket Veto Case* on the ground that the Senate and House now provide for an agent to receive messages from the President after adjournment. However, the Court made clear in *The Pocket Veto Case* that, "even if authorized by Congress itself," an attempted return of the bill by means of delivery to an agent of Congress "would not comply with the constitutional mandate" (279 U.S. at 684). As the Court stressed, its construction of the Clause was supported by "[l]ong settled and established practice" (*id.* at 689), "commencing with President Madison's administration" (*id.* at 691).

The court of appeals erred in believing that *Wright v. United States*, 302 U.S. 583 (1938), justified its refusal to follow *The Pocket Veto Case*. *Wright* expressly did not disturb the holding in *The Pocket Veto Case*. The Court also repeatedly stressed in *Wright* that the recess in question was not an adjournment by "the Congress," to which the Pocket Veto Clause refers, but rather a three-day recess that was taken by only one House and was limited by the constitutional provision (Art. I, § 5, Cl. 4) that prohibits an adjournment of more than three days without concurrent action by both Houses.

The conclusion that the Pocket Veto Clause is applicable whenever Congress has adjourned sine die is, in any event, compelled by the language of the Article I, Section 7, Clause 2, which directly links the status of a bill to the formal act of adjournment by Congress. This rule specified by the Constitution cannot be altered by the internal rules of either House authorizing an agent to receive messages from the President following an adjournment. The lawmaking procedures of which the Pocket Veto Clause is an integral part make clear that the Constitution regards the disapproval of a bill by the President

as an important occasion of disagreement between the political Branches that must be promptly recorded on the journal of the originating House and be subject to immediate resolution. To require the President to deliver a bill to an agent of Congress, with whom it might languish for weeks or months until Congress reconvenes, would trivialize the importance the Framers attached to the President's return of a bill.

ARGUMENT

I. THIS CASE IS MOOT BECAUSE, EVEN IF H.R. 4042 BECAME A LAW, ITS CERTIFICATION REQUIREMENT EXPIRED ON SEPTEMBER 30, 1984

As respondents stated in the court of appeals, they did not bring this action "merely to assert an abstract interest in bill publication."⁴ Rather, respondents sought a declaration that H.R. 4042 had become a law in order to cause the President to follow the bill's certification requirement before giving further military aid to El Salvador.⁵ The plain and undeniable truth, however, is that the question whether H.R. 4042 became a law was rendered moot on September 30, 1984—more than six months before the court of appeals issued its opinions—when the certification requirement imposed by H.R. 4042 was to expire in any event. Regardless of whether H.R. 4042 ever *was* a law, it plainly is not *now* a law, and no form of judicial relief can change that fact. This case therefore has "lost its character as a present, live controversy of the kind that must exist if [the Court is]

⁴ Br. for Appellants and Pet. for Issuance of a Writ of Mandamus 6 (Jan. 10, 1984).

⁵ To that end, when plaintiffs filed their complaint on January 4, 1984, they requested a ruling from the district court before January 16, 1984, the date on which the next certification would have been due if the bill had become a law. See J.A. 44. When the district court denied their motions for expedited treatment and a preliminary injunction (J.A. 37, 41), plaintiffs unsuccessfully sought emergency relief from the court of appeals (J.A. 48-52).

to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969).

It is fundamental that a challenge to a statute becomes moot when the statute is no longer in force. See, e.g., *Kremens v. Bartley*, 431 U.S. 119, 128-129 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414-415 (1972); cf. *National Organization for Women, Inc. (NOW) v. Idaho*, 459 U.S. 809 (1982) (challenge to Congress's extension of ratification period for constitutional amendment became moot when extended period expired). Despite respondents' efforts early in the litigation to obtain a ruling at a time when a judgment in their favor might have provided meaningful relief (see note 5, *supra*), the certification requirement contained in H.R. 4042 expired before the suit could be completed. Accordingly, this Court should follow its "established practice" of "vacat[ing] the judgment below and remand[ing] with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That course is especially appropriate here, because this case involves fundamental constitutional questions that may "legitimate[ly] [be resolved] only in the last resort, and as a necessity in the determination of real, earnest and vital controversy.'" *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (citation omitted).

Respondents now argue (J. Br. in Opp. 11-12; H.R. Br. in Opp. 17-18⁶) that this case is not moot because they are entitled to see H.R. 4042 published in the Statutes at Large. But even if respondents had standing to request such relief (but see pages 28-30, *infra*), their reliance on the purely collateral consequence of publication plainly is insufficient to save this case from mootness. *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

⁶ "J. Br. in Opp." refers to the joint brief filed by Michael D. Barnes, et al., and the United States Senate. "H.R. Br. in Opp." refers to the brief filed by the Speaker and Bipartisan Leadership Group of the House of Representatives.

Petitioner Burke's failure to publish H.R. 4042 as the dead letter that it now undeniably is has no effect whatsoever on respondents' lawmaking powers, the asserted "nullification" of which, they acknowledge (J. Br. in Opp. 7), was the "underlying injury" on which this lawsuit was premised. The bill publication statutes do not "implement the constitutional design for the legislative process," as respondents baldly assert (J. Br. in Opp. 4), because the Constitution nowhere requires that a bill be published in the Statutes at Large in order for it to be a law. If the Pocket Veto Clause was inapplicable despite the adjournment sine die of the First Session of the 98th Congress, then H.R. 4042 automatically became a law on the tenth day (Sundays excepted) following its presentment to the President, notwithstanding the failure to publish it. By the same token, if Congress's adjournment sine die prevented the return of the H.R. 4042 within the meaning of that Clause, the bill did not become a law, and it could not be rendered one by publication. And either way, H.R. 4042 does not now and never will have any legal effect.

For this reason, acceptance of respondents' suggestion that they have a continuing interest in the publication of H.R. 4042 would convert this case into a "debate[] concerning harmless, empty shadows." *Poe v. Ullman*, 367 U.S. 497, 508 (1961) (opinion of Frankfurter, J.). Indeed, on respondents' theory, they could challenge even the earliest pocket vetoes, which occurred as much as 175 years ago, simply by seeking a formal acknowledgment in the Statutes at Large that, contrary to the long-accepted view, the bills involved had become laws. Although respondents sought declaratory and injunctive relief requiring publication of H.R. 4042 as a law (J.A. 28-29, 59, 90), that relief had been viewed (until the bill expired) as merely a formal acknowledgment of the fundamental relief they desired: vindication of their roles in the enactment of a law by a judgment that would cause the President to follow the certification requirement of H.R. 4042.

Moreover, respondents' contention that this case is still "live" because they seek formal recognition of their position that H.R. 4042 once had the force of law is indistinguishable from the argument rejected by this Court in *NOW v. Idaho*. There, the State of Idaho urged that a challenge to Congress's power to extend the ratification period for the Equal Rights Amendment was not moot because the Administrator of General Services, by "refusing to make any official announcement honoring the rescinding resolutions of other states," had "damaged the sovereign power and authority of the states" and "deprived members of the Idaho Legislature of the effectiveness of their votes." Response of the States of Idaho and Arizona, et al., in Opposition to the Administrator's Suggestion of Mootness, at 11. This Court nevertheless unanimously directed that the case be dismissed as moot (459 U.S. at 809). Because such an "official announcement" is all that respondents seek here, *NOW* requires that the judgment below be vacated and the case remanded with instructions to dismiss as moot.⁷

II. RESPONDENTS DO NOT HAVE STANDING TO OBTAIN A JUDICIAL DECLARATION THAT H.R. 4042 BECAME A LAW

This case would be nonjusticiable even if it were not moot, because respondents have from the outset lacked standing to sue. Respondents alleged only that the votes of the individual Members in favor of the bill have been

⁷ Respondents attempt (J. Br. in Opp. 13 n.10; H.R. Br. in Opp. 17 n.20) to distinguish *NOW* on the ground that Idaho there sought an acknowledgement that its Legislature voted against a failed measure, while respondents here seek recognition that they voted in favor of a bill that passed both Houses of Congress. Although this distinction might have made a difference for mootness purposes if H.R. 4042 were still capable of being put into effect, that bill can enjoy no greater legal status at this late date than could the unsuccessful constitutional amendment at issue in *NOW*. The only question in both cases is whether formal publication by the responsible government officials of the position taken by the plaintiff is sufficient, in the absence of continuing legal consequences, to keep a case alive.

"nullified" (Pet. App. 8a) and that the "lawmaking powers of the two houses of Congress" have been "injur[ed]" (*id.* at 9a). See J.A. 27, 58, 90. The court of appeals held that these allegations were sufficient to confer standing on respondents, relying on a doctrine of congressional standing unique to the District of Columbia Circuit (*ibid.*).⁸ That doctrine, however, ignores the concern for separation of powers that is the foundation of the law of standing. The Constitution does not confer on the Legislative Branch or its Members any legally cognizable interest, enforceable through the courts, in the conduct or affairs of a coordinate Branch.

It is particularly clear that respondents do not have standing in this case. At bottom, they complain of nothing more than the President's failure to regard H.R. 4042 as a law and to follow its certification provisions. Such a generalized grievance is not judicially cognizable. Members of Congress, like members of the public they represent who are not specifically injured, lack the personal stake necessary to challenge the manner in which Executive Branch officials execute the law. So, too, do the Senate and House of Representatives, which are collective bodies "composed" of Senators and Members (Art. I, § 2, Cl. 1; Art. I § 3, Cl. 1) who themselves lack standing.

A. The Separation Of Powers On Which Principles Of Standing Are Based Forecloses Suits By Congress Or Its Members Challenging The Actions Of Executive Officials

In *Allen* the Court made clear that "the law of Art. III standing is built on a single basic idea—the idea of sepa-

⁸ See, e.g., *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984), cert. denied, 469 U.S. 1106 (1985); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981); *Kennedy v. Sampson*. The doctrine has thus far gone unreviewed by this Court: in the cases in which the Court denied certiorari, the court of appeals had, "largely through application of the doctrine of equitable discretion, * * * awarded judgment for the party that was challenging standing." *Moore*, 733 F.2d at 960 (Scalia, J., concurring).

ration of powers" (468 U.S. at 752). This "basic idea" is rooted in the text of Article III, which extends the "judicial Power" only to "Cases" and "Controversies." Art. III, § 2, Cl. 1. These terms reflect historical practices that limited courts to a role that was "strictly judicial in its character" (*Muskrat v. United States*, 219 U.S. 346, 355 (1911), quoting *Gordon v. United States*, 117 U.S. 697, 706 (1864)).⁹ This limitation also is reflected in the reference in Article III to cases "in Law and Equity", which "was a term well understood, and of limited signification." *Speech of Chief Justice Marshall to the House of Representatives*, 18 U.S. (5 Wheat.) App. 3, 16 (1820). Cf. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 405 (1821). The terms "Cases" and "Controversies" thus were intended to confine the federal courts to resolving those disputes that have "assume[d] such a form that the judicial power is capable of acting on [them]" (*Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 819 (1824)) and "are traditionally thought to be capable of resolution through the judicial process" (*Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

A central feature of a "case" or "controversy" as so conceived is that the dispute must be submitted by a "proper and appropriate party" (*Flast*, 392 U.S. at 102) in "such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs" (*Muskrat v. United States*, 219 U.S. at 357, quoting *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (1887) (Field, J.)).

⁹ This interpretation is confirmed by the debates of the Constitutional Convention. In response to a motion to extend the judicial power to cases arising under the Constitution, James Madison questioned whether the jurisdictional grant "ought not to be limited to cases of a Judiciary Nature," because "[t]he right of expounding the Constitution in cases not of this nature ought not to be given to that Department." The proposal was adopted, but so too was Madison's view of the circumstances in which the courts might pass on constitutional questions, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." 2 *The Records of the Federal Convention of 1787*, at 430 (M. Farrand ed. 1966) [hereinafter cited as Farrand].

In order to be a "proper and appropriate party," the plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (*Valley Forge*, 454 U.S. at 472, quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)), and that he "stand[s] to profit in some personal interest" by a judgment in his favor (*Allen*, 468 U.S. at 766, quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976)). In particular, the plaintiff must allege a distinct personal stake in the outcome, rather than "generalized grievances about the conduct of government or the allocation of power in the Federal System" (*United States v. Richardson*, 418 U.S. 166, 173 (1974), citing *Flast*, 392 U.S. at 106).

Through these requirements, the prerequisite of standing imposes a "fundamental limit[]" on federal judicial power in our system of government" (*Allen*, 468 U.S. at 750). See also *Richardson*, 418 U.S. at 188 (Powell, J., concurring) ("Relaxation of standing requirements is directly related to the expansion of judicial power."). It assures that legal questions will be resolved "in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action"; and it "reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order," so that the judicial power is "more than a vehicle for the vindication of the value interests of concerned bystanders" (*Valley Forge*, 454 U.S. at 472-473, quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)). Standing requirements of course take on added significance when an exercise of judicial power would "affect[] relationships between the coequal arms of the National Government," because "repeated and essentially head-on confrontations between the life tenured branch and the representative branches of government will not, in the long run, be beneficial to either" (*Valley Forge*, 454 U.S. at 473-474, quoting *Richardson*, 418 U.S. at 188 (Powell, J., concurring)).

There is an irreconcilable conflict between the principles of separated powers that Article III embodies and

a case, such as this one, in which a court is asked to referee an intragovernmental dispute *between* the political Branches, and to do so in the absence of any claim by a private party that he has been injured or that he stands to benefit as a result of the court's decision. Compare *Chadha*, 462 U.S. at 935-936. The injury alleged here—a “nullification” of the votes of individual Members and the impact on the “lawmaking powers” of Congress resulting from the President's determination that H.R. 4042 failed to become a law—is not an injury in the conventional Article III sense. Instead, it is merely a restatement of respondents' disagreement with the President's interpretation of the Pocket Veto Clause of the Constitution. Neither the President nor Congress (or its Members) could unilaterally obtain an advisory opinion from the federal courts with respect to whether H.R. 4042 became a law. See Correspondence of the Justices, reprinted in 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891); *Muskrat*, 219 U.S. at 354. That issue is no more suitable for judicial resolution in its present posture merely because the Senate and some Members of the House have put their request in the form of a complaint and named as defendants two officials of the other political Branch who happen to take a contrary view of the constitutional issue.¹⁰ The

¹⁰ Congress's request for a ruling regarding the legal status of a measure passed by the House and Senate resembles the proposal, rejected by the Constitutional Convention, for joining members of the Judiciary in a council of revision to review all bills passed by the National Legislature. This design was opposed because such participation might bias the judges in future litigation coming before them, detract from the responsibility of the President, and “involve[] an improper mixture of powers.” 1 Farrand 139-140. Opponents also argued that the Judiciary “should have the confidence of the people,” which “will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature” (2 Farrand 76-77), and that “Judges ought never to give their opinion on a law till it comes before them” (*id.* at 80). See generally *id.* at 73-80. These reasons for disassociating the Judicial Branch from disputes between the political Branches in the legislative process, and for confining the judicial

Framers did not contemplate that the federal courts would, in this manner, assume “a role of continual and pervasive intrusiveness into the relationships of the branches” and “step directly between the other branches [to] settle disputes, presented in the abstract, about powers of governance.” Pet. App. 75a (Bork, J., dissenting).¹¹

There are, moreover, special factors defining the role of Congress under the Constitution that counsel against a holding that Congress has a legally cognizable interest and is a “proper and appropriate party” to sue for a declaration concerning the actions of the Executive or the consequences of Congress's actions under the Constitution. It is the “legislative Powers” that Article I, Section 1 vests in Congress, and those powers consist of the “authority to make laws” (*Buckley v. Valeo*, 424 U.S. 1,

role in such matters to the resolution of cases that are properly brought before the courts by parties who are directly and personally affected, weigh heavily against recognition of a right in Congress or its Houses and Members to submit the dispute between the political Branches in the instant case to the federal courts. Compare *Richardson*, 418 U.S. at 189-191 & n.9 (Powell, J., concurring).

¹¹ We do not suggest, of course, that the particular issue that respondents seek to litigate—whether H.R. 4042 failed to become a law by operation of the Pocket Veto Clause—is itself a “political question” that cannot be resolved by the federal courts in any case. That question plainly can be decided in a suit brought by a party who would have rights under the bill if it did become a law. See *The Pocket Veto Case*; *Wright v. United States*. Nevertheless, the considerations underlying the political question doctrine properly inform the standing inquiry in this case. For just as the doctrine of Article III standing rests on principles of separation of powers (*Allen*, 468 U.S. at 750), “[t]he non-judiciability of a political question is primarily a function of the separation of powers” and “the relationship between the judiciary and the coordinate branches of the Federal Government” (*Baker v. Carr*, 369 U.S. 186, 210 (1962)). In this a suit brought by Members of the Legislative Branch against officials of the Executive Branch, with no private parties or rights involved, the separation-of-powers concerns given expression by the political question doctrine have a special applicability and make it especially inappropriate for the Judicial Branch to step between the political Branches to resolve a purely intragovernmental dispute. See *Goldwater v. Carter*, 444 U.S. 996, 1004-1005 (1979) (Rehnquist, J., concurring).

139 (1976), quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)).¹² In providing for the separation of powers and a system of checks and balances, the Framers sought "to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *Chadha*, 462 U.S. at 951. Consistent with this plan, Congress's "powers are confined to legislative duties, and restricted within prescribed limits." *Gordon v. United States*, 117 U.S. at 705.

Congress's ability to assert its will in ways that affect the operation of the other Branches is therefore confined to the powers and means of exercising those powers that are provided for in the Constitution. Specifically, because of concern that Congress would aggrandize itself at the expense of the other Branches, the Framers required that all actions by Congress that have "the purpose and effect of altering the legal rights, duties and relations of * * * Executive Branch officials [and others] outside the Legislative Branch" (*Chadha*, 462 U.S. at 952) must be in the form of a duly enacted law. See generally *id.* at 945-951. Congress's "[d]isagreement" with the Executive Branch therefore "involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President" (*id.* at 954-955). Just as Congress cannot overrule Executive action directly by means of a legislative veto, Congress cannot accomplish the same result indirectly by invoking the assistance of the federal courts to prosecute its disagreement with the Executive. See *The Federalist* No. 48, at 308 (Madison) (Rossiter ed. 1966) ("none of the departments "ought to possess, *directly or indirectly*, an overruling influence over the others in the administration of their respective duties").

¹² See *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 417 (1819) ("Could it be necessary to say, that a legislature should exercise legislative powers, in the shape of legislation?"); *The Federalist* No. 32, at 202 (Hamilton) (Rossiter ed. 1966) ("What is a LEGISLATIVE power but a power of making LAWS? What are the means to execute a LEGISLATIVE power but LAWS?").

The Constitution is structured to give each Branch specified powers—checks and balances—in relation to the other Branches as a means of confining each to its respective authority. *The Federalist* No. 51, at 320 (Madison). But the Court has construed these express constitutional provisions for the involvement by one Branch in the affairs of another to be exclusive. See, e.g., *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127; *Myers v. United States*, 272 U.S. 52, 116 (1926); *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). Accordingly, and in light of the other resources available to Congress in its legislative and oversight capacities (see *Chadha*, 462 U.S. at 954-955 & nn.18, 19; *Laird v. Tatum*, 408 U.S. 1, 15 (1972)), Congress and its Members should not be accorded a wholly unaccustomed right, heretofore unrecognized by this Court, to invoke the offices of the federal courts to resolve a dispute with the Executive Branch. As this Court has held, the "power to seek judicial relief * * * is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.' Art. II, § 3." *Buckley*, 424 U.S. at 138.¹³

¹³ It is significant that the Framers made available an alternative process by which Congress may bring about an adjudication of the legality of conduct by Executive Branch officials, but carefully limited the circumstances and manner in which it may be invoked. That alternative is impeachment by the House (Art. I, § 2, Cl. 5) and trial by the Senate (Art. I, § 3, Cl. 6), but only in cases of possible "Treason, Bribery, or other high Crimes and Misdemeanors" (Art. I, § 4). The impeachment process was regarded as "political" in nature, in the sense that it provides for an inquiry into the "conduct of public men" (*The Federalist* No. 65, at 396-397) (Hamilton). For that reason, the power was lodged in Congress itself, with the Senate sitting as a court of impeachment. See generally *id.* at 396-401; *The Federalist* No. 66, at 401-407 (Hamilton). Proposals to involve the Judiciary in the impeachment process were rejected. *The Federalist* No. 65, at 398-400 (Hamilton); 2 Farrand 39, 46, 159, 172, 186-551. The circumstances of

In sum, the standing decision of the court of appeals in this case violates the doctrine of separation of powers in two related and mutually reinforcing respects. First, it fails to adhere to "the proper—and properly limited—role of the courts in a democratic society" (*Warth v. Seldin*, 422 U.S. 490, 498 (1975)) and the fundamental principle that whether a plaintiff has "suffered cognizable injury" (*Valley Forge*, 454 U.S. at 474) "must be answered by reference to the Art. III notion that federal courts may exercise power only 'in the last resort, and as a necessity.'" *Allen*, 468 U.S. at 752, quoting *Chicago & Grand Trunk Ry. v. Wellman*, 143 U.S. 339, 345 (1892). Second, it erroneously attributes to Congress a legally cognizable interest, capable of being implemented through the agency of the federal courts, in overseeing the manner in which the Executive Branch interprets and executes the law.¹⁴

the present case of course do not remotely implicate the impeachment power. But the express provision in the Constitution for this carefully circumscribed means by which Congress may initiate an adjudication regarding the legality of the conduct of Executive officials strongly reinforces the conclusion that the Constitution forecloses Congress from calling on the federal courts to adjudicate a dispute with Executive Branch officials in other, wholly different circumstances. *Chadha*, 462 U.S. at 955-956; *Kilbourn*, 103 U.S. at 191.

¹⁴ Respondents' reliance (J. Br. in Opp. 8) on *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is misplaced. That was an action by an individual to receive the governmental commission that he claimed he was owed, the denial of which was indisputably an injury-in-fact to him in his private capacity. We do not dispute that a person claiming to have been elected to Congress would have standing to sue to vindicate his entitlement to office (although the suit might be nonjusticiable for other reasons). Cf. *Powell v. McCormack*, 395 U.S. 486 (1969). This case, however, concerns not a private entitlement to office, but the boundaries of the powers of such an office, presented wholly apart from any private injury. See *Moore*, 733 F.2d at 959 (Scalia, J., concurring) (distinguishing the "private right to the office itself" from "the powers of the office," which "belong to the people and not to [the officers themselves]").

B. Members Of Congress Do Not Have Standing To Challenge Executive Action Or Inaction On The Ground That It Has "Nullified" Their Votes

As shown above, the court of appeals erred in recognizing a general right of Congress (or its Members) to bring suit to vindicate an asserted interest in obtaining a particular interpretation of the Constitution. But even if congressional standing might properly be recognized under some circumstances, respondents in this case lack standing for yet another, albeit related, reason: respondents alleged injury is no more than a generalized grievance arising from the President's failure to follow the certification requirements that would have been imposed if H.R. 4042 became a law. Especially when asserted by Congress or its Members, such a generalized grievance is not one "traditionally thought to be capable of resolution through the judicial process" (*Allen*, 468 U.S. at 752, quoting *Flast*, 392 U.S. at 97). See Pet. App. 81a-89a (Bork, J., dissenting).

The individual Members of Congress argued below that the President's position that H.R. 4042 was not a validly enacted law, and the resulting failure to publish the bill as a law, had "nullified" their votes in favor of the bill. See Pet. App. 8a-9a; J.A. 27. At bottom, however, this argument is nothing more than a claim that the President has failed to execute the law. The individual respondents do not and could not claim that they were denied an opportunity to vote in Congress. Their votes were fully counted and, indeed, were fully effective in securing the passage of H.R. 4042 and its presentment to the President. Thus, respondents' argument can only be that their votes have been "nullified" because the President did not adhere to the requirements of H.R. 4042 after it passed both Houses.

Once this is understood, the court of appeals' error becomes manifest. If the President had admitted that H.R. 4042 had become a law but refused to enforce it, individual Members of Congress plainly would lack standing to sue. Members of Congress are not injured in a manner distinct from citizens generally as a result of the Presi-

dent's alleged failure to enforce a law. See Pet. App. 68a (Bork, J., dissenting) ("[T]he Framers * * * did not conceive of the powers of elected representatives as apart from the powers of the electorate."). Nor is there anything in the role established for Congress by the Constitution that confers on either House or the Members of which they are composed a special right to ensure, outside of the political process, that laws passed by Congress are enforced. See *Ameron, Inc. v. United States Army Corps of Engineers*, 787 F.2d 875, 888 (3d Cir. 1986) (congressional intervenors "lack their own standing to obtain an injunction forcing compliance with the law," because "Congress's interest in its enforcement is no more than that of the average citizen"); *AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982) ("Any interest that a congressman has in the execution of laws would seem to be shared by all citizens equally."). And, of course, a citizen who asserts merely an "abstract injury in nonobservance of the Constitution" or federal statutes lacks standing to sue. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974). *Diamond v. Charles*, No. 84-1379 (Apr. 30, 1986), slip op. 9; *Valley Forge*, 454 U.S. at 482-483; *Allen*, 468 U.S. at 754; *Reservists*, 418 U.S. at 217; *Ex parte Levitt*, 302 U.S. 633 (1938).¹⁵

In other words, Members of Congress do not have any continuing, quasi-proprietary stake in a bill after it has passed out of the domain of the Legislative Branch. At that point, any official relation of the Federal Government to the measure devolves upon the other two Branches. *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). If the bill becomes a law,

¹⁵ This limitation on standing is especially salient in the context of an attack on the spending practices of the Executive Branch. The Court emphasized in *Valley Forge* that "the expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing" (454 U.S. at 477), and that the limited exception to this rule enunciated in *Flast v. Cohen* is inapplicable to challenges directed at actions of the Executive, rather than Congress (454 U.S. at 479).

it is the President's responsibility under Article II, Section 3 to "take Care" that it is "faithfully executed" and the Judiciary's responsibility to interpret the law in a case properly brought before it. But no justiciable case or controversy is presented by the manner of the Executive's implementation unless a plaintiff alleges distinct and palpable injury flowing from the Executive's action or inaction. *Allen*, 468 U.S. at 751.¹⁶

The consequences of recognizing congressional standing to challenge whether the President is properly executing the laws would be especially untoward. In the absence of private injury, the Constitution has left "much of the allocation of powers * * * to political struggle and compromise." Pet. App. 79a (Bork, J., dissenting). Recognition of congressional standing to assert the type of injury

¹⁶ Respondents' extensive reliance (J. Br. in Opp. 9; H.R. Br. in Opp. 13, 14) on *Coleman v. Miller*, 307 U.S. 433 (1939), is misplaced. There, the Court held that it had jurisdiction to review the decision of a state court that, unconstrained by Article III, had decided federal constitutional questions in an action brought by state legislators. The Court concluded that the interest of the legislators, which was "treated by the state court as a basis for entertaining and deciding the federal questions," was "sufficient to give the Court jurisdiction to review that decision" (307 U.S. at 446). *Coleman* does not stand for the broad proposition that all legislators have standing to bring an action in federal court on the basis of an asserted injury to their lawmaking functions. See Pet. App. 95a-99a (Bork, J., dissenting). Although the state senators in *Coleman* were held by the state supreme court to have a legally cognizable interest as a matter of state law in the effectiveness of their vote, the doctrine of separation of powers demonstrates that federal legislators have no comparable interest under the federal Constitution. Cf. *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Reynolds v. Sims*, 377 U.S. 533, 572-575 (1964); *United States v. Gillock*, 445 U.S. 360, 370-372 (1980); *Bender v. Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 10 n.7. Moreover, the injury asserted by the legislators in *Coleman* arose out of the voting procedures followed in the state senate (see 307 U.S. at 436)—a subject that would appear to be particularly immune from judicial scrutiny as regards Congress (Art. I, § 5, Cl. 2; Art. I, § 6, Cl. 1) and that differs in kind from the challenge presented here, which is essentially a generalized challenge to an alleged failure by the Executive to enforce the law.

claimed by respondents here would allow, and indeed encourage, Members of Congress to circumvent the "intensely practical" process of "compromise and accommodation" that is essential to the day-to-day "business of government." *Id.* at 78a.¹⁷ Instead, federal judges, who often are "not familiar with the very real and multitudinous problems of governing" (*ibid.*), would routinely be called upon to resolve disputes between the political branches. And they would be required to do so before a law's "real effects upon real persons in real circumstances" (*ibid.*) could be known.

Moreover, even if Congress or one of its Houses might have such standing, individual Members of Congress clearly could not. This follows directly from *Bender v. Williamsport Area School District*, No. 84-773 (Mar. 25, 1986). There, the Court held that "members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take." Slip op. 9-10. Under *Bender*, if there is a judicially cognizable injury to Congress at all, only that body may assert it. See *United States v. Ballin*, 144 U.S. 1, 7 (1892) ("Power is not vested in any one individual, but in the aggregate of the members who compose [the House of Congress] * * *"). This clear rule best comports with the separation of powers, because it does not enmesh the judiciary in intrusive and essentially political inquiries into whether a particular Member is faithfully advancing the considered views of the Legislative Branch. Cf. *Goldwater v. Carter*, 444 U.S. 996, 997-998 (1979) (Powell, J., concurring). This rule also reflects the reality that, upon passage of a bill, the vote of an individual Member merges into the vote of the House as a whole, as attested by the signature of the responsible officer of that House. *Field v. Clark*, 143 U.S. 649, 672 (1892).

¹⁷ In *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985), the court of appeals acknowledged that its doctrine of congressional standing has spawned a "plethora of cases" in which individual Members of Congress have "challenge[d] actions or failures to act as violations of the [M]embers' interests as legislators."

C. The Senate And The Speaker And Bipartisan Leadership Group Of The House Do Not Have Standing To Challenge The Application Of The Pocket Veto Clause Based On Alleged Injury To The Lawmaking Powers Of Congress

The intervenor-respondents alleged below that the President's reliance on the Pocket Veto Clause in his decision not to give effect to H.R. 4042 deprived the Senate and House of their "constitutional role in the enactment of legislation" (J.A. 58, 90). However, it is immaterial that respondents have chosen to describe their injury in terms of the lawmaking provisions of Article I, Section 7, rather than the President's duty faithfully to execute the laws. Whatever form of words respondents might choose, this suit is in all respects equivalent to one expressly challenging the President's execution of the laws.

In any event, neither Article I, Section 7 in general nor its Pocket Veto Clause in particular creates any judicially cognizable interests on the part of Congress. Article I, Section 7, by "prescrib[ing] and defin[ing] the respective functions of the Congress and of the Executive in the legislative process" (*Chadha*, 462 U.S. at 945), merely establishes a "rule of recognition"¹⁸ for identifying those measures that have become laws of the United States. Accordingly, the failure by either Congress or the Executive to invoke its respective prerogatives under the Constitution's "finely wrought" lawmaking procedures (*Chadha*, 462 U.S. at 951) is not a "violation" of the Constitution. It follows that such a failure by one Branch does not give rise to a constitutionally based "injury" to the other that may be redressed by the courts.¹⁹

¹⁸ H. Hart, *The Concept of Law* 92 (1961).

¹⁹ In *Chadha*, for example, the President did not claim that he suffered a legally cognizable injury as a result of the exercise of the legislative veto and that he was therefore entitled to a judicial declaration or injunction forbidding its use. Rather, the case arose in an adversary context between the INS and an alien facing deportation (462 U.S. at 93^a). Although the Senate and House were permitted to *intervene* in the regular statutory review proceedings

In the present context, for example, the only consequence of the operation of the self-executing procedures in Article I, Section 7 is that H.R. 4042 either did or did not become a law, depending upon whether its return to the originating House was prevented by Congress's adjournment. In either event, the only legal significance of the operation of Article I, Section 7 is for persons who would have rights or duties under the bill if it did become a law. By contrast, neither alternative has an impact on Congress or its Houses and Members. Their role in the legislative process as regards H.R. 4042, which extended only to the presentment of the bill to the President, remains fully effective and effectuated, because any failure of H.R. 4042 to become a law is attributable to circumstances occurring after presentment. And Congress likewise is unimpeded in the continued performance of its legislative duties as regards other bills. Congress therefore suffers no "distinct and palpable" injury (*Allen*, 468 U.S. at 751) as a result of the President's determination that H.R. 4042 did not become a law, and Congress does not "stand to profit in some personal interest" (*id.* at 766) as a result of a judicial resolution of that question. Accordingly, Congress has no standing to bring an action against Executive Branch officials to litigate that issue.

Instead, whether any particular bill became a law notwithstanding the President's withholding of his approval of it is a question properly answered by a court only in an action brought by a private person who has a direct stake in the status of the bill. See *Diamond*, slip op. 7. The mere fact that some bills, such as H.R. 4042, might not affect private rights in a manner that would give any

initiated by the alien under 8 U.S.C. 1105a, in order to *defend* the constitutionality of the challenged statute (462 U.S. at 930 n.5, 939), that case does not suggest that the House and Senate would have had standing as *plaintiffs* to bring an independent action against the Attorney General challenging the statutory validity of his decision not to deport Chadha (see *id.* at 957 n.22) or seeking an abstract declaration of the constitutional validity of the legislative veto.

private person standing to obtain a judicial declaration of their validity is plainly insufficient to confer standing on Congress. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Reservists*, 418 U.S. at 227; *Valley Forge*, 454 U.S. at 489.²⁰

²⁰ Even if it might in some circumstances be permissible for courts to referee a dispute solely between the Legislative and Executive Branches, the intervenors in this case—the Senate and the Speaker and Bipartisan Leadership Group of the House—lack standing to represent Congress as a whole. The Court emphasized in *Chadha* that the bicameral character of the Legislative Branch "serve[s] essential constitutional functions" by "assur[ing] that the legislative power would be exercised only after opportunity for full study and debate in separate settings" (462 U.S. at 951). For this reason, apart from certain "narrow, explicit, and separately justified" exceptions (*id.* at 956) not relevant here, Congress may act only through the express concurrence of both houses.

Such concurrence would be particularly important in the context presented here. As we have explained with respect to the standing of individual members of Congress, the separation of powers concerns raised by congressional standing are heightened where the courts cannot be assured that the parties purporting to represent the interests of Congress truly are doing so. This concern at least could be addressed by requiring that Congress as a whole express its position on participation in a particular case by means of a concurrent resolution. In this case, although the Senate authorized its Legal Counsel to intervene (S. Res. 98-313, 98th Cong., 2d Sess. (1984); 130 Cong. Rec. S237 (daily ed. Jan. 26, 1984)), there is no indication that the House conferred similar authority on the Speaker and Bipartisan Leadership Group.

Furthermore, the Senate Legal Counsel has statutory authority to intervene only in pending legal actions concerning "the powers and responsibilities of Congress." 2 U.S.C. 288e(a) and (c). This action, at bottom, does not concern the powers of Congress; it concerns whether H.R. 4042 became a law and (according to respondents' current theory) whether petitioners must bring about its publication. Moreover, the Senate Legal Counsel is not authorized to *initiate* an action on behalf of the Senate against the Executive. See S. Rep. 95-170, 95th Cong., 1st Sess. 103 (1977). Because the plaintiff Members of Congress did not have standing to sue and because the Senate could not have initiated this action, the Senate's intervention did not provide a basis for continuing this suit. See 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1917, at 584-586 (1972).

D. Respondents Do Not Have Standing To Enforce The Bill Preservation And Publication Statutes

Respondents now argue (J. Br. in Opp. 5-7, 11-12; H.R. Br. in Opp. 17-18) that, independent of their alleged interest in the substantive validity of H.R. 4042, they have standing to enforce the statutes providing for the preservation and publication of bills that have become laws. See 1 U.S.C. (Supp. II) 106a, 112, 113. Respondents obviously make this argument in an effort to avoid mootness, now that H.R. 4042 can have no legal effect in its own right. But respondents' efforts are unavailing, because they clearly do not have standing to seek a judicial order requiring the preservation and publication of H.R. 4042 as a law. Respondents have nothing more than a "generalized interest" (*Reservists*, 418 U.S. at 217), shared by all citizens, in the availability of public notice of the laws of the United States. See *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980). That interest is insufficient to confer standing, especially because respondents received actual notice of H.R. 4042 by virtue of their participation in the legislative process. See *Lyng v. Payne*, No. 84-1948 (June 17, 1986), slip op. 11 n.6.

Respondents argue (J. Br. in Opp. 5-7), however, that Members of Congress are special beneficiaries of the publication statutes and that they therefore have an interest distinct from that of the public generally that entitles them to bring an action to compel publication. Respondents rely (*id.* at 5-6) on a statute passed by the First Congress, the predecessor to the present 1 U.S.C. (Supp. II) 106a. Act of Sept. 15, 1789, ch. 14, § 2, 1 Stat. 68; see Rev. Stat. § 204 (1875 ed.) In respondents' view, the provision in this 1789 statute for the delivery of a printed copy of a law to Senators and Representatives establishes that they have a sufficient stake in the publication of a law to permit them to bring this action to have H.R.

4042 declared a law and published as one under the statutes administered by the Archivist.²¹

Respondents fail to point out that the provision of the 1789 Act and related provisions expressly directing that copies of bills be furnished to Members of Congress²² have been repealed as "obsolete" and "archaic." Act of Dec. 28, 1874, ch. 9, § 2, 18 Stat. 294 (see Cong. Globe, 43d Cong., 2d Sess. 226 (1874) (remarks of Sen. Edmunds)); Act of July 10, 1952, ch. 632, §§ 2, 7, 66 Stat. 540, 541 (see S. Rep. 1714, 82d Cong., 2d Sess. 1, 2 (1952)). Nevertheless, we may assume for present purposes that if the Archivist withheld from a Member of Congress a copy of a bill that had become a law and been received by the Archivist, the Member would have standing to bring an action to compel release of a copy to him (cf. 5 U.S.C. 552(a)(4) (FOIA))—although respondents surely could obtain a copy of H.R. 4042 if that were all they wanted. See, e.g., App., *infra*, 2a. What respondents have formally requested, however, is not a copy of the bill, but its publication.

But of course, at bottom, respondents seek far more than the mere enforcement of any of the statutory duties of the Archivist under 1 U.S.C. (Supp. II) 106a, 112 and 113 to preserve, publish, and make available copies of bills that have become laws. They seek to litigate the constitutional question of whether H.R. 4042 ever became a law. The ministerial bill preservation and publication statutes administered by the Archivist were never intended to create a right of action by Congress or anyone else to litigate that question.²³ Furthermore, as we have explained

²¹ Under respondents' theory, the Governor of a State apparently also would have standing to sue the Archivist to obtain a judicial determination that H.R. 4042 became a law, because Governors too were entitled to receive copies of laws under the 1789 Act.

²² See Act of Apr. 20, 1818, ch. 80, § 4, 3 Stat. 439; Act of Jan. 12, 1895, ch. 23, § 73, 28 Stat. 615; 44 U.S.C. (1946 ed.) 196a.

²³ Under the 1789 statute upon which respondents rely, the publication and distribution duties of the Secretary of State were not triggered until he had "received" the bill that had become a law from the President (or from the Speaker of the House or the Secretary of the Senate if the bill was repassed over the President's ob-

above (see pages 13-20, *supra*). Congress and its Houses and Members would not have standing under Article III to bring such a suit even if Congress had purported to authorize it.

III. H.R. 4042 FAILED TO BECOME A LAW WHEN THE PRESIDENT DID NOT RETURN IT TO THE HOUSE OF REPRESENTATIVES WITHIN TEN DAYS OF PRESENTMENT, BECAUSE CONGRESS, BY ITS ADJOURNMENT SINE DIE, PREVENTED THE RETURN OF THE BILL WITHIN THE MEANING OF ARTICLE I, SECTION 7, CLAUSE 2 OF THE CONSTITUTION

For the reasons stated in Points I and II, *supra*, the judgment of the court of appeals should be vacated and

jections). The current statute that triggers the Archivist's duties is essentially identical in this respect. See 1 U.S.C. (Supp. II) 106a. This statutory scheme makes clear that whether a particular bill has become a law is a matter to be resolved by the delivering official (here the President), not by the Archivist. That question therefore cannot be resolved in a suit against the Archivist to require publication of a bill he has not "received."

This defect in the basis upon which respondents now pursue this case is not cured by their joining of petitioner Geisler, the Executive Clerk of the White House, as a defendant, in order to compel him to deliver H.R. 4042 to the Archivist. The statutes upon which respondents rely do not mention the Executive Clerk or impose a duty on him to deliver a law to the Archivist. Section 106a states that the Archivist is to receive the law from the *President*, and it therefore is the President who must make the antecedent judgment whether the bill has become a law and therefore should be delivered to the Archivist. The Executive Clerk is merely the President's agent for the delivery of the bill if the President resolves that question in the affirmative. In this case, however, the President has resolved that question in the negative. Nothing in 1 U.S.C. (Supp. II) 106a, 112 or 113 suggests that it confers a right of action on Congress or anyone else to sue the Archivist or the Executive Clerk—inferior officers who are subordinate to the President—in order to collaterally attack such a decision by the President.

By contrast, in a suit brought by a proper plaintiff claiming substantive rights under a bill that he contends became a law, there would be no occasion for the plaintiff to rely on the bill publication statute or to name the Archivist or the Executive Clerk as a defendant. The plaintiff would sue the head of the agency concerned or other proper defendant to vindicate his substantive right.

the case remanded with directions to dismiss, because the case is moot and because respondents do not in any event have standing to bring this suit. If the Court rejects these submissions, the judgment of the court of appeals should be reversed on the merits.

The court of appeals clearly erred in holding that H.R. 4042 became a law when the President did not return it with his objections to the House of Representatives within ten days (Sundays excepted) after it was presented to him. By the time that ten-day period elapsed, Congress had ended the First Session of the 98th Congress and adjourned sine die. Accordingly, by operation of the last portion of Article I, Section 7, Clause 2 of the Constitution—commonly known as the "Pocket Veto" Clause—H.R. 4042 failed to become a law because "the Congress by their Adjournment prevent[ed] its Return." This conclusion is compelled by the unanimous decision in *The Pocket Veto Case*, 279 U.S. 655 (1929), which involved the precise issue presented in this case. And despite the court of appeals' strained effort to read *Wright v. United States*, 302 U.S. 583 (1938), as altering the rule established in *The Pocket Veto Case*, that later opinion only affirms the reasoning of *The Pocket Veto Case*.

A. The Text, Origins And Purposes Of Article I, Section 7 Establish That H.R. 4042 Did Not Become A Law

As this Court observed in *Chadha*, "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process" (462 U.S. at 945). Those functions are principally set forth in the detailed provisions of Article I, Section 7, Clause 2, which were "finely wrought and exhaustively considered" by the Framers (462 U.S. at 951). The final portion of that Clause, at issue here, addresses the situation in which Congress has rendered itself unavailable to participate further in the legislative process when the ten-day period that the Constitution affords the President to review a

bill expires. If the President does not sign the bill, the Constitution deems Congress's inability to reconsider it to be the termination of the legislative process with respect to the bill, which then automatically fails of enactment. As we explain below, this conclusion is supported by the text, origins, and purposes of the Pocket Veto Clause, and of the lawmaking procedures in Article I, Section 7 of which that Clause is a part.

1. *The Pocket Veto Clause*

a. A straightforward reading of the constitutional text establishes that H.R. 4042 did not become a law. The final sentence of Article I, Section 7, Clause 2 provides that "[i]f any Bill shall not be returned by the President [to the House in which it originated] within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in the same Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law." By the expiration of the ten-day period after H.R. 4042 was presented to the President, Congress had ended the First Session of the 98th Congress. That adjournment prevented the President from returning the bill to be reconsidered by the House of Representatives.

Contrary to the court of appeals' view (Pet. App. 30a-31a, 36a, 46a), nothing in the constitutional text suggests that H.R. 4042 *did* become a law, despite the President's failure to approve it and Congress's adjournment, merely because the Rules of the House authorized the Clerk to receive messages from the President when the House was not in session. The Pocket Veto Clause speaks in terms of whether Congress's "Adjournment prevent[ed] [the bill's] Return," thereby directly linking the status of the bill to the formal act of adjournment by Congress. The significance that the Constitution attaches to the act of adjournment at the moment of its occurrence is unaffected by whatever responsibilities an officer of one House might have *after* the adjournment.

b. The irrelevance of the Clerk's authority is confirmed by the status under the Constitution of the rules of one

House of Congress. The Constitution provides that "Each House may determine the Rules of its Proceedings" (Art. I, § 5, Cl. 2), and each House's rules properly may define the powers of its officers in connection with "internal matters" (*Chadha*, 462 U.S. at 956 n.21). But such rules cannot amend the provisions of the Constitution that govern the external relations of Congress with the President in the legislative process. Cf. *United States v. Ballin*, 144 U.S. 1, 5 (1892). The Legislative Branch addresses the President in that process only by concurrent action of the House and Senate. In addition, as the Court held in *Chadha*, the constitutional requirement of bicameralism affirmatively bars one House from taking action that affects the legal rights and duties of persons outside the Legislative Branch (462 U.S. at 948-951, 952). Whether the return of a bill was "prevent[ed]" within the meaning of the Constitution determines whether that bill has become a law and, in this case, the nature of the responsibilities of the President and other Executive officials. Accordingly, under *Chadha*, whether a bill has failed to become a law by operation of the Pocket Veto Clause must depend upon whether Congress withdrew from the legislative process by bicameral action of the House and Senate, as the Constitution requires for any adjournment of more than three days (Art. I, § 5, Cl. 4), not on the unicameral action of one House in authorizing an agent to receive messages following such an adjournment. This bicameralism requirement is reflected in the Pocket Veto Clause's reference to an adjournment by "the Congress," which consists of the House and the Senate. See Art. I, § 1; *Wright*, 302 U.S. at 585-587; *Chadha*, 462 U.S. at 945.

c. In addition to adhering to the rule of bicameralism, the Pocket Veto Clause also incorporates the fundamental precept that legislative action requires the interaction of Congress and the President, while maintaining the autonomy of each. The significance of these principles is made manifest by Article I, Section 7, Clause 2, which reinforces the presentment requirement that the Pocket

Veto Clause implements. Clause 3 provides that "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (*except on a question of adjournment*) shall be presented to the President of the United States" (emphasis added). See *Chadha*, 462 U.S. at 947. The emphasized exception was intended to afford the Senate and House independence from the President (although not from each other) in transacting the business of the Legislative Branch. See 1 J. Story, *Commentaries on the Constitution of the United States* §§ 843-844, at 582-583 (3d ed. 1858).²⁴ But the Framers prescribed a reciprocal independence for the President by assuring, through the Pocket Veto Clause, that his status and participation in the legislative process would be respected if Congress did adjourn. Although the President cannot prevent Congress from adjourning before he has completed his review of a bill, the consequence of Congress's premature withdrawal from the legislative process is that the bill will fail if the President does not sign it.

For these reasons, as the Court recognized in *The Pocket Veto Case*, the term "pocket veto" is a misnomer, and the notion that the operation of the Pocket Veto Clause is equivalent to the exercise of an absolute veto by the President "involves a misconception of the reciprocal rights and duties of the President and of Congress and of the situation resulting from an adjournment" (279 U.S. at 676). The terminology and the concepts it embodies both rest on the erroneous premise that the failure of a bill "is necessarily due to the disapproval of the President and the intentional withholding of the bill from reconsideration" (*id.* at 676-677). In truth, "the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would

²⁴ The President has a limited role in relation to adjournments by virtue of Article II, § 3, which provides that the President "may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper."

have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill had expired" (*id.* at 678-679). See also H.R. Rep. 93-1021, 93d Cong., 2 Sess. 2 (1974) ("A pocket veto is something the Congress causes. It is the result that occurs when Congress waives its right to reconsider legislation when its adjournment prevents the return of a bill.").²⁵

The interpretation of the Pocket Veto Clause required by its plain language thus implements the principles of bicameralism and autonomy immanent in the congressional prerogative of "adjournment" and the shared responsibilities of the political Branches in the legislative process. The Constitution simply deems an adjournment by Congress to be an event that breaks the formal relationship between the Legislative and Executive Branches in the lawmaking process. Just as an adjournment prevents the President from dealing directly with Congress on any other matter until it reconvenes, an adjournment prevents him from returning a bill to Congress for reconsideration. In this case, even if H.R. 4042 and the President's objections thereto had been delivered to the Clerk of the House after Congress adjourned sine die, the President's formal communication to the House itself could not have been accomplished until the Clerk delivered the bill and the President's objections to the House when Congress commenced the Second Session of the 98th Congress some nine weeks later. The inability of the President to exercise his prerogative of communicating his objections directly to the House, sitting as one component of a co-equal Branch, was by no means cured by the fact that the House

²⁵ Congress can avoid the failure of a bill to become a law simply by delaying its adjournment and remaining in session until the President's time to consider the bill has expired. Alternatively, if a bill fails of enactment by operation of the Pocket Veto Clause, Congress can promptly pass an identical bill when it reconvenes. *The Pocket Veto Case*, 279 U.S. at 679 n.6.

authorized its Clerk to receive messages while the House was not in session.

d. In practical terms, the effect of the President's delivery of a bill to the Clerk for subsequent delivery to the House would be the same as if the President simply retained the bill and returned it directly to the House when Congress reconvened. It is significant, however, that the Constitutional Convention specifically rejected a proposal to require the President to follow the latter course. An initial draft of the Clause considered by the Committee of Detail provided that a bill that was not returned by the Executive within the prescribed period after presentment would become a law "unless the Legislature, by their Adjournment, prevent its Return; in which Case it Shall be returned on the first Day of the next Meeting of the Legislature." 2 Farrand 162 (emphasis added).²⁶ But the Committee revised the Clause to provide that the bill "shall not be a law" if Congress by its adjournment prevented the return (*id.* at 181), and the Convention adopted the Clause in that form (*id.* at 296, 302). The records of the Convention do not disclose the reasons for this change. However, the most plausible explanation clearly is that the Drafters were unwilling to permit the status of an unsigned bill to remain uncertain until such time as Congress might reconvene, and that they chose instead to provide for that status to be resolved definitively when Congress has adjourned. The decision of the court of appeals fails to respect this deliberate choice by the Framers.

²⁶ This proposal apparently was patterned after the New York Constitution of 1777, which provided that an unapproved bill would become a law "unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days." 7 W. Swindler, *Sources and Documents of United States Constitution* 172-173 (1975). See *The Federalist* No. 69, at 417 (Hamilton); *United States v. Weil*, 29 Ct. Cl. 523, 545 (1894); cf. *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276, 281 (1919).

2. Article I, Section 7, Clause 2 As A Whole

The Pocket Veto Clause of course is not an isolated provision of the Constitution; it is an integral element of the "step-by-step, deliberate and deliberative process" prescribed in Article I, Section 7 for the enactment of legislation (*Chadha*, 462 U.S. at 959). The text and purposes of Article I, Section 7 unambiguously establish that the Framers regarded the President's review of bills as a "momentous duty" (*The Pocket Veto Case*, 279 U.S. at 677) and that the disapproval of a bill by the President therefore was to be regarded as a momentous occasion of disagreement between the political Branches. See *Chadha*, 462 U.S. at 946-948; *The Federalist* No. 73, at 442-446 (Hamilton). The formal return of a bill by the President is the mechanism adopted in the Constitution for bringing about a resolution of that disagreement. An adjournment by Congress "prevent[s]" the return of a bill to Congress within the meaning of the Constitution because it prevents Congress from resolving the disagreement by either sustaining the President's disapproval or repassing the bill over his objections. The Pocket Veto Clause therefore specifies an alternative resolution in such circumstances, by declaring that the bill "shall not be a Law." The court of appeals' holding that the return of a bill may be accomplished by delivery to an agent of the House, where it may languish for weeks or months, completely ignores these fundamental principles.

The special procedures that the Framers prescribed in the event of the President's disapproval of a bill attest to the significance of the occasion. Article I, Section 7, Clause 2 provides that if the President does not approve a bill, "he shall return it, with his Objections, to that House in which it shall have originated, who *shall* enter the Objections at large on their Journal, and proceed to reconsider it"; if two-thirds of that House then agree to pass the bill, it "*shall* be sent" to the other House, by which "*it shall* likewise be reconsidered"; and if the bill also is approved by two-thirds of the second House, "*it shall* become a Law" (emphasis added). Moreover, "in

all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively." As this Court has observed, "it was plainly the object of [these] provision[s] that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its consideration" (*The Pocket Veto Case*, 279 U.S. at 684-685; see also *Wright*, 302 U.S. at 590, 595).²⁷ The effect, then, is to require that the disagreement between the President and Congress be noted in the official record of legislative proceedings, that the respective positions of the President and each Senator and Representative also be made a part of that record, and that there be an opportunity for immediate resolution of the confrontation between the political Branches.

It necessarily follows that "under the constitutional mandate [a bill] is to be returned to the 'House' when sitting in an organized capacity for the transaction of business, and having authority to receive the return, enter the President's objections on its journal, and proceed to reconsider the bill" (279 U.S. at 683); see also *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276, 280-283 (1919); cf. *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821). 'The court of appeals' holding that the return of a bill is not "prevent[ed]" within the meaning of the Pocket Veto Clause whenever an agent of the originating House is

²⁷ In conformity with this mandate, "[i]t is the usual but not invariable rule that a bill returned with the objections of the President shall be voted on at once * * *, but it has been held that the constitutional mandate that 'the House shall proceed to consider' means that the House shall immediately proceed to consider it under the rules of the House, and that the ordinary motions under the rules of the House—to refer, to commit, or to postpone to a day certain—are in order * * *." W. Brown, *Constitution, Jefferson's Manual and Rules of the House of Representatives*, H.R. Doc. 97-271, 97th Cong., 2d Sess. § 108, at 46 (1983).

authorized to accept physical delivery of a message from the President cannot be reconciled with the procedures designed to bring about prompt public notice and an immediate resolution of the disagreement between the political Branches. The agent of an adjourned House has no authority to spread the President's objections at large on the journal of the House, and a bill that is delivered to him would be kept in "suspended animation" until Congress reconvened (*The Pocket Veto Case*, 279 U.S. at 684)—which in this case did not occur for nine weeks. To accord significance to the presence of an agent would trivialize the formal return of a bill by the President—which the Constitution deems to be a matter of profound urgency and public importance requiring the immediate attention of Congress itself, just as presentment requires the President to give his immediate attention to the bill and return it with his objections within ten days.

B. This Court's Decisions In *The Pocket Veto Case* And *Wright v. United States* Foreclose The Argument That H.R. 4042 Became A Law

As we have shown in Point A, *supra*, the text, origins, and purposes of the Pocket Veto Clause establish that Congress's adjournment sine die in this case "prevent[ed]" the President from returning H.R. 4042 to the House of Representatives for reconsideration. That question is not, however, one of first impression for the Court. The Court considered this precise question in *The Pocket Veto Case*, unanimously holding that a bill does *not* become a law in such circumstances, and the Court unanimously adhered to that view in *Wright v. United States*. Those decisions are controlling here and require reversal of the judgment below.

1. The Court in *The Pocket Veto Case* stated the question presented in terms that apply here as well (279 U.S. at 672):

This case presents the question whether, under the second clause in Section 7 of Article I of the Constitution of the United States, a bill which is passed by both Houses of Congress during the first regular ses-

sion of a particular Congress and presented to the President less than ten days (Sundays excepted) before the adjournment of that session, but is neither signed by the President nor returned by him to the House in which it originated, becomes a law in like manner as if he had signed it.

The Court held that such a bill does not become a law.²⁸

Moreover, the Court in *The Pocket Veto Case* specifically rejected the very arguments upon which the court of appeals relied in this case. First, the Court dismissed the "argument that the word 'adjournment' as used in the constitutional provision refers only to the final adjournment of the Congress" at the end of its biennial term; it found "nothing in the context which warrants the insertion of such a limitation" (279 U.S. at 680). Second, although the Court acknowledged that under modern practice unfinished legislative business before either House is carried over from one session to the next (*id.* at 675), it found "no substantial basis for the suggestion that although the House in which the bill originated is not in session the bill may nevertheless be returned * * * by delivering it, with the President's objections, to an officer or agent of the House," who might then submit the bill to the House at its next session (*id.* at 683-684). The Court concluded that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate," because "[t]he House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at that time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires" (*id.* at 684).

The court of appeals in this case nevertheless has effectively confined the application of the Pocket Veto Clause

²⁸ The Court stated its holding as follows: "[W]e conclude that the adjournment of the first session of the 69th Congress on July 3, 1926, prevented the President, within the meaning of the constitutional provision, from returning Senate Bill No. 3185 within ten days, Sundays excepted, after it had been presented to him, and that it did not become a law" (279 U.S. at 691-692).

to "final" adjournments,²⁹ attaching dispositive significance to the authority of the Clerk to receive messages from the President following an adjournment and to rules of the House and Senate permitting the carryover of business from one session to the next (Pet. App. 31a, 33a-36a & n.27, 40a-41a, 45a-46a). That holding is flatly inconsistent with *The Pocket Veto Case*.

2. In declining to follow *The Pocket Veto Case*, the court of appeals relied on this Court's decision nine years later in *Wright v. United States* (Pet. App. 27a-30a, 32a-33a, 37a-39a). However, *Wright* in fact reaffirmed the holding in *The Pocket Veto Case*, and the court of appeals' reasoning in this case (and in *Kennedy v. Sampson*) in fact is inconsistent with the reasoning in *Wright*.

In *Wright*, the Senate, in which the bill in question had originated, was in a three-day intrasession recess when the ten-day period for the President to return the bill expired; the House of Representatives, however, remained in session. The President disapproved the bill, and he returned it to the Senate by delivering it to the Secretary of the Senate, who in turn delivered the bill to the President of the Senate when it reconvened two days later. 302 U.S. at 585. Despite the President's express disapproval of the bill, the petitioner in *Wright* contended that it became a law through an anomaly in the Constitution:

²⁹ There is no textual support for the notion that the adjournment of the last session in each two-year period that is designated as a sequentially enumerated "Congress" is unique in any respect that bears on the application of the Pocket Veto Clause. The two-year period is constitutionally significant only in defining the term during which Members of Congress hold office. Art. I, § 2, Cl. 1; Art. I, § 3, Cl. 1; Art. I, § 3, Cl. 2; Amend. XX. The Constitution itself does not speak of "terms" of Congress; it speaks of "Sessions." See, e.g., Art. I, § 5, Cl. 4; Art. II, § 2, Cl. 3. See also Art. I, § 4, Cl. 2 (Congress "shall assemble at least once in every Year"); Amend. XX, § 2 (same). For this reason, even if the Framers had intended to limit the application of the Pocket Veto Clause to "final" adjournments by Congress (but see pages 43-44, *infra*), they would have had in mind the adjournment at the conclusion of a session, as in this case. See, e.g., *La Abra Silver Mining Co.*, 175 U.S. at 454; J. Story, *supra*, § 891, at 652.

He argued that the Pocket Veto Clause was inapplicable, and that the President's attempted return of the bill to the Senate was ineffective because that return could not be accomplished by delivery to the Secretary of the Senate. See 302 U.S. at 596-597. Not surprisingly, the Court declined to interpret the Constitution to require that result.

The Court first concluded that the Senate's three-day recess was not an adjournment by "the Congress" that prevented the return of the bill within the meaning of the Pocket Veto Clause (302 U.S. at 587-589). Citing the "precise use of terms and careful differentiation" between Congress and its individual Houses found in Article I, Section 7, Clause 2, the Court held that "the [Pocket Veto] clause describes not an adjournment of either House as a separate body, or an adjournment of the House in which the bill shall have originated, but the adjournment of 'the Congress'" (302 U.S. at 587). Accordingly, because "[t]he Congress' did not adjourn" and "[t]he Senate alone was in recess," the Court held that the Pocket Veto Clause was inapplicable (*ibid.*). See also *id.* at 589, 592, 597.³⁰

Having decided that the Pocket Veto Clause was inapplicable, the Court turned to and rejected the argument that the President's return of the bill nevertheless was ineffective because it was accomplished by means of delivery to the Secretary of the Senate, rather than to the Senate in session (302 U.S. at 589-593). The Court repeatedly stressed that the Senate was in a unicameral recess taken under the "constitutional permission" (*id.* at 593) of Article I, Section 5, Clause 4, which provides: "Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days." See 302 U.S. at 589, 590, 591, 592, 595, 596, 598. Because the Pocket Veto Clause was inappli-

³⁰ Justice Stone joined by Justice Brandeis, would have held that the Pocket Veto Clause is applicable whenever the House in which a bill originated is not in session on the day that the President's time to consider the bill expires. See 302 U.S. at 605-609.

cable, the Court found "no violation of any express requirement of the Constitution" in the return of the bill by means of delivery to an agent of the originating House.³¹ The Court explained that "[u]nder the constitutional provision the Senate was required to reconvene in not more than three days and thus would be able to act with reasonable promptitude" (*id.* at 589-590).

The Court was careful, however, not to disturb the rule of *The Pocket Veto Case*. It first observed that in *The Pocket Veto Case*, unlike in *Wright*, "the Congress had adjourned," and the Court accordingly had no occasion in the former case to decide whether the Pocket Veto Clause "applies where the Congress has not adjourned and a temporary recess has been taken by one House during the session of Congress" (302 U.S. at 593). Moreover, the Court noted that the purposes of the Clause that were discussed in *The Pocket Veto Case* would not be undermined by an arrangement permitting the return of a bill through an officer of the originating House while it is in a recess of three days or less (302 U.S. at 595):

In such case there is no withholding of the bill from appropriate legislative record for weeks or perhaps months, no keeping of the bill in a state of suspended animation with no certain knowledge on the part of the public whether it was seasonably delivered, no causing of any undue delay in its reconsideration.

Finally, the Court stressed the narrowness of its holding and expressly refrained from addressing the situation in which even one House, with the consent of the other, might take a longer adjournment during a session of Congress (*id.* at 598).³²

³¹ With regard to the conclusion in *The Pocket Veto Case* that a bill must be returned to "the House in session" (279 U.S. at 682), the Court stated in *Wright* (302 U.S. at 594): "[T]hat expression should not be construed so narrowly as to demand that the President must select a precise moment when the House is within the walls of its chambers and that a return is absolutely impossible during a recess however temporary."

³² In *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899), the Court held that a bill became a law when the President

It thus is clear on the face of the opinion that *Wright* furnished the court of appeals no support whatever for refusing to follow *The Pocket Veto Case* and for holding that the Pocket Veto Clause is inapplicable to an adjournment sine die that concludes the first session of a Congress. Moreover, although the court of appeals also relied on *Wright* for its holding in *Kennedy v. Sampson* that the Pocket Veto Clause has no application to any intrasession adjournment by Congress, *Wright* likewise fails to support that holding. *Wright* relied extensively on the three-day limit imposed by Article I, Section 5, Clause 4 on the length of an adjournment that can be taken without the concurrence of both Houses. That Clause specifies the dividing line between those adjournments that are deemed to be substantially disruptive of the legislative process and therefore to require bicameral action, and those "brief recess[es]" (*Wright*, 302 U.S. at 595) that the Framers concluded were not sufficiently likely to interfere with the business of Congress to require bicameral action.³³ In light of this function, the Clause should also be regarded as the constitutionally specified dividing line between those adjournments that "prevent" the President from returning a bill for immediate reconsideration by Congress and those brief recesses that do not unacceptably postpone such reconsideration.

signed it within ten days of presentment, even though Congress in the meantime had adjourned for 13 days during the session. See *id.* at 451. The decision in *La Abra* necessarily assumed that, but for the President's approval, the bill, by operation of the Pocket Veto Clause, would not have become a law. In fact, during the intrasession adjournment that was at issue in *La Abra*, an unsigned bill failed of enactment under that Clause. See *Presidential Vetoes, 1789-1976*, at 141 (U.S. Senate Library comp. 1978) [hereinafter cited as *Presidential Vetoes*].

³³ In the Virginia ratifying convention, James Madison explained the Clause by stating that "it would be very exceptionable to allow the senators, or even the representatives, to adjourn without the consent of the other house, at any season whatsoever, without any regard to the situation of public exigencies" (3 Farrand 312).

Indeed, the Court in *Wright* expressly recognized the significance of the Three-Day Adjournment Clause in this setting, observing that a three-day recess by one House in conformity with that Clause "does not constitute such an interruption of the session of the House" as to give rise to the dangers identified in *The Pocket Veto Case* (302 U.S.C. at 596). Contrary to the court of appeals' conclusion in *Kennedy v. Sampson*, *Wright* did not suggest that the Pocket Veto Clause is wholly inapplicable to intrasession adjournments by both Houses of Congress, irrespective of the resulting delay in reconsideration. *A fortiori*, *Wright* furnishes no support for the court of appeals' holding that the adjournment sine die in this case, which terminated the First Session of the 98th Congress and resulted in the absence of Congress for a period of nine weeks, did not "prevent" the return of a H.R. 4042 within the meaning of the Pocket Veto Clause.

C. Practical Construction Of The Constitution Strongly Supports The Conclusion That The Return Of H.R. 4042 Was "Prevent[ed]" By Congress's Adjournment

1. In *The Pocket Veto Case*, the Court found that "the practical construction that has been given to [the Pocket Veto Clause] * * * through a long course of years" "confirmed" its conclusion that the Clause is applicable following an adjournment sine die (279 U.S. at 688-689). The first occasion on which a bill failed to become a law by operation of the Clause followed the adjournment of the First Session of the Twelfth Congress. See *Presidential Vetoes* 5. When the Second Session of the Twelfth Congress convened, President Madison transmitted a message to Congress stating: "[H]aving been presented at an hour too near the close of the session to be returned with objections for reconsideration, the bill failed to become a law." 25 Annals of Cong. 18 (1853). This early and authoritative interpretation of the Clause by one of the principal architects of the Constitution and its presentment requirement (see *Chadha*, 462 U.S. at 947) is en-

titled to great weight. See *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Moreover, prior to *The Pocket Veto Case*, "all the Presidents who * * * had occasion to deal with this question * * * adopted and carried into effect the construction * * * that they were prevented from returning the bill to the House in which it originated by the adjournment of the session of Congress; and * * * this construction ha[d] been acquiesced in by both Houses of Congress" (279 U.S. at 691). As of that time, 119 bills had been neither signed nor returned with the President's objections following such an adjournment, and "[n]one of these bills or resolutions was placed upon the statute books or treated as having become a law" (*id.* at 690). This "[l]ong settled and established practice," stated the Court, "is a consideration of great weight in a proper interpretation of constitutional provisions of this character" (*id.* at 689). See *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 412 (1928); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

The historical understanding as regards an adjournment sine die, which is the type of adjournment involved in this case, continued after *The Pocket Veto Case*. The court of appeals recognized "that the view that intersession adjournments do create an opportunity for a pocket veto has been accepted through most of the history of the Republic by both the President and Congress" (Pet. App. 41a), and it acknowledged that, "through President Nixon, twenty-five of the thirty Presidents who have exercised the pocket veto power at all have done so during intersession adjournments" (*id.* at 41a-42a). Furthermore, "[i]n each of these pocket vetoes—272 in all—Congress has acquiesced" (*id.* at 42a). See also H.R. Rep. 93-1021, *supra*, at 1-2. In fact, in almost 200 years, there are only three instances—all occurring since *Kennedy v. Sampson*—in which a President purported to return a bill with his objections following the adjournment of a session sine

die.³⁴ These recent incidents simply underscore the degree to which the court of appeals' unprecedented approach to the Pocket Veto Clause, adopted first in *Kennedy v. Sampson* and applied here in complete derogation of *The Pocket Veto Case*, has overturned a long-settled construction of the Clause.³⁵

³⁴ See *Presidential Vetoes* 460 (S. 2350), 461 (H.R. 5900); *id.* at 5 (Supp. 1977-1984) (S. 2096). In *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976), a companion case to *Kennedy v. Sampson*, both an intersession pocket veto and an intrasession pocket veto were challenged. The litigation in *Kennedy v. Jones* was terminated by a consent judgment providing for publication of the bills at issue as laws. *Id.* at 356. At about the same time, President Ford announced that if he disapproved a bill that was before him during either an intrasession or an intersession adjournment, he would return the bill with his objections to the originating House if it had specifically authorized an officer or agent to receive such messages. See 122 Cong. Rec. 11202 (1976) (statement of Attorney General Levi). Two bills were delivered to agents of the originating House during intersession adjournments during the administration of President Ford and one was delivered in this manner during the administration of President Carter, but none was repassed over the President's objections.

³⁵ Prior to *Kennedy v. Sampson*, the practice also was consistent with respect to bills from which the President withheld his approval during intrasession adjournments by Congress of more than three days. See 511 F.2d at 442-445 (appendix listing 38 "pocket vetoes" during such adjournments) (the actual total may be much higher, depending upon whether certain adjournments were correctly characterized as intersession in nature; *id.* at 444 nn.4-6).

Until the 1860s, Congress rarely adjourned for more than three days during a session. *Kennedy v. Sampson*, 511 F.2d at 442-445. As a result, there apparently was no occasion to decide whether the Pocket Veto Clause applied in such circumstances until 1867, when two bills failed to become laws during a 16-day adjournment. See *Presidential Vetoes* 35. In a message to Congress, President Johnson stated that an adjournment "in accordance with a concurrent resolution" is the "precise condition in which [the Constitution] positively declares that a bill 'shall not be a law.'" Cong. Globe, 40th Cong., 2d Sess. 720 (1868). The Senate then debated whether the Clause is applicable during any adjournment that involves "the joint action of both Houses" (*ibid.* (remarks of Sen. Buckalew)) or whether it instead is limited to "an adjournment sine die" (*id.* at 721 (remarks of Sen. Sumner)). Shortly after

2. The court of appeals seemed to believe, however, that despite this practice and the Court's decisions in *The Pocket Veto Case* and *Wright*, the question whether the return of a bill is "prevent[ed]" following an adjournment sine die remained open for it to decide, essentially as a matter of fact, taking into account whether delivery of the bill was physically possible through an agent of the originating House and whether the delay and uncertainty occasioned by the particular adjournment were sufficient, in the court's view, to give rise to the concerns against which the Pocket Veto Clause was designed to protect. See Pet. App. 30a-37a; *Kennedy v. Sampson*, 511 F.2d at 439-442. Such an ad hoc approach would be unworkable. A "definite and formal" rule (*United States v. Smith*, 286 U.S. 6, 35 (1932)) is required to ascertain whether a bill has become a law by operation of the Pocket Veto Clause, just as such a rule is supplied at other steps of the specific procedures prescribed by Article I, Section 7 for the enactment of legislation.

this debate, a bill, S. 366, 40th Cong., 2d Sess. (1868), was introduced that would have declared that the Clause is applicable only when a session of the Congress has adjourned. This proposal drew strong opposition on constitutional grounds. See *The Pocket Veto Case*, 279 U.S. at 686-690 n.11; Cong. Globe, 40th Cong., 2d Sess. 1371-1373, 1404-1405, 1406, 1940-1943, 2076-2078 (1868). Although the bill was passed by the Senate, it was never reported out of committee in the House. 279 U.S. at 687.

In the ensuing 70 years, bills that were not signed during intrasession adjournments of more than three days continued to be regarded as not having become laws. *Presidential Vetoes* 141, 165, 167, 231; see also 20 Op. Att'y Gen. 503 (1892). This pattern was briefly interrupted in 1940 when, during a 10-day adjournment, President Roosevelt delivered eight disapproval messages to the Secretary of the Senate. *Presidential Vetoes* 310-313. The messages were laid before the Senate when it reconvened (86 Cong. Rec. 9566-9568 (1940)), but no steps were taken to repass the bills over the President's objections. After this incident, bills left unsigned during intrasession adjournments of more than three days again were regarded as having failed of enactment (see 40 Op. Att'y Gen. 274 (1943)), and that pattern continued until *Kennedy v. Sampson* was decided in 1974. 511 F.2d at 443-445.

Even the court of appeals conceded, however, that "clear rules respecting the pocket veto are vitally necessary in order that the status of bills in presidential disfavor be promptly resolved" (Pet. App. 38a). But rather than adhering to the "clear rules" specified in the Constitution and *The Pocket Veto Case*, the court held, on the basis of its own factual perceptions of modern circumstances, that the return of a bill is not actually prevented, and that the Pocket Veto Clause therefore is inapplicable, in entire categories of cases: all "intrasession" adjournments (in *Kennedy v. Sampson*) and all "intersession" adjournments (in this case). In the court's view, this result was justified because adjournments now typically are shorter than those the Framers might have foreseen when they drafted the Clause. See 511 F.2d at 411; Pet. App. 32a-33a, 40a-41a.

The court's factual premise is erroneous, because there is no reason to believe that the Framers had any fixed preconceptions about how often and how long Congress would sit or how frequent and protracted its adjournments would be.³⁶ But however that may be, the court of appeals had no authority to disregard the explicit constitutional text, consistent historical practice, and this

³⁶ See 2 Farrand 197-200 (debates on the Annual Assembly Clause, Art. I, § 4, Cl. 2). Immediately prior to the Constitutional Convention, the Continental Congress had been in session for over ten months, from January 2, 1786, to November 13, 1786. During that time it had taken 39 recesses for one day, six for two days, and one for four days. Previously, the Continental Congress had been in almost continuous session from September 13, 1775, until June 3, 1784. Its longest adjournment in the decade that preceded the Constitutional Convention lasted five months, from June 3, 1784, to November 1, 1784. See 27 J. Continental Cong. 490, 641 (G. Hunt ed. 1928). The First and Fifth Congresses under the Constitution sat in three sessions, and in the first ten years, the annual date of assembly was repeatedly altered by Congress. See 1983-1984 *Congressional Directory* 418 (Joint Comm. on Printing, 98th Cong., comp. 1983); see also 1 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 5-12, at 3-7 (1907). Moreover, the sessions of the first five Congresses ranged in length from 57 to 246 days, and adjournments ranged from two to nine months. 1983-1984 *Congressional Directory*, *supra*, at 418.

Court's unanimous decision in *The Pocket Veto Case*, based on its own view that changed circumstances have rendered the Pocket Veto Clause anachronistic. Compare *Chadha*, 462 U.S. at 958-959. The Constitution itself stipulates that an adjournment "prevent[s]" the return of a bill, because it renders Congress unavailable for immediate receipt and reconsideration of the bill. Whether the return of a bill is prevented was not a factual question to be resolved by the court of appeals.

Moreover, the court of appeals seriously erred in believing that in modern circumstances, neither "intra-session" nor "intersession" adjournments give rise to the concerns underlying the Pocket Veto Clause. The fundamental purposes of Article I, Section 7 in this context—to assure prompt and public notation of the objections of the President on the formal record of legislative proceedings, and an opportunity for immediate resolution of what the Constitution regards as an important disagreement between the political Branches—are as important today as they were in 1787, when the Framers rejected a proposal to postpone Congress's consideration of the President's objections to the next meeting of Congress. Those purposes are seriously undermined by the court of appeals' holding, which effectively reads the Pocket Veto Clause out of the Constitution, except with respect to what the court characterized as a "final" adjournment at the conclusion of a Congress.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded with directions to dismiss on the ground that the case is moot or that respondents do not have standing to sue. If the court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND BILL INVOLVED

1. a. Article I, Section 5, Clause 4 of the Constitution provides:

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

b. Article I, Section 7, Clauses 2 and 3 of the Constitution provide:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections, to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

(1a)

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

c. Article III, Section 2 , Clause 1 of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

2. H.R. 4042, 98th Cong., 1st Sess. (1983), provided:

That the requirements of section 728 of the International Security and Development Cooperation Act of 1981 (including the last sentence of subsection (e) of that section) shall continue to apply after the end of the fiscal year 1983 until such time as the Congress enacts new legislation providing conditions for United States military assistance to El Salvador or until September 30, 1984, whichever occurs first.

QUESTIONS PRESENTED

1. Whether the court of appeals properly recognized the standing of the United States Senate and the leadership and Members of the House of Representatives to redress the nullification of their votes by Executive officials' failure to publish a law that Congress enacted and that became a law without the President's signature, pursuant to article I, section 7, clause 2 of the Constitution.

2. Whether the nullification of Congress' vote to enact this law continues to impose cognizable injury upon the Congress.

3. Whether the court of appeals correctly held that the President's failure to return a bill to the originating House, by delivering it to the officer appointed to accept veto messages during Congress's intersession adjournment, caused the bill to become a law, because the President was not constitutionally "prevented" from returning the bill, under article I, section 7, clause 2.

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In the Supreme Court of the United States

OCTOBER TERM 1985

No. 85-781

**FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, AND RONALD GEISLER, EXECUTIVE CLERK
OF THE WHITE HOUSE, PETITIONERS**

v.

MICHAEL D. BARNES, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

**JOINT BRIEF OF RESPONDENTS MICHAEL D. BARNES, ET AL.,
AND THE UNITED STATES SENATE**

This case presents the question on the merits whether H.R. 4042, 98th Congress, has become a law. Congress enacted the bill and presented it to the President, but the President neither signed it nor returned it to the originating House of Congress with his objections. Representative Michael D. Barnes, et al., the Members of the United States House of Representatives who initiated this action, and the United States Senate, which intervened in the district court, submit this joint brief in support of the judgment of the court of appeals that H.R. 4042 became a law, because the President was not "prevented" from returning the bill within the meaning of Article I, section 7, of the Constitution.

SUMMARY OF ARGUMENT

I. The court of appeals correctly held that respondents have standing to sue. The cognizability of respondents' claim is established by *Coleman v. Miller*, 307 U.S. 433, 438 (1939), in which the Court conferred standing upon Kansas state legislators because of their "plain, direct and adequate interest in maintaining the effectiveness of their votes" to defeat Kansas's ratification of a constitutional amendment. Respondents likewise have standing because they, too, "have set up and claimed a right and privilege under the Constitution to have their votes given effect. . . ." *Ibid*.

Consistently with *Coleman* the Court has regularly recognized the standing of governmental officers to challenge infringements on their authority. In *United States v. Smith*, 286 U.S. 6 (1932), the Court adjudicated the Senate's claim that it had the constitutional right to reconsider its confirmation of a Presidential nominee. Indeed, as early as *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), the Court recognized the standing of a putative government official to vindicate, not pecuniary interests, but the right to exercise the authority of his office. Since *Marbury* the Court has recognized the standing of cabinet officers, *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953), former Presidents, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and states, *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), to redress injuries to their official authority.

The case-or-controversy requirement serves the separation of powers by minimizing conflicts between the judiciary and the elected Branches, avoiding interference with the political process, and restraining adjudication of questions that are "most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). Recognition of respondents' standing to vindicate their legislative role under the Constitution will strengthen, not erode, these separation-of-

powers principles. Contrary to petitioners' misapprehension, respondents do not challenge the Executive's execution of H.R. 4042, but seek only the performance of mandated ministerial duties that complete the lawmaking process.

The recognition of respondents' standing will reduce controversy between the Branches. "[T]he political branches [have] reach[ed] a constitutional impasse," *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring), over a pure question of constitutional law, whose resolution is not subject to the political process. *INS v. Chadha*, 462 U.S. 919, 940-43, 957-59 (1983). Therefore, this case is unlike *Goldwater*, where it was uncertain "whether there ever will be an actual confrontation between the Legislative and Executive Branches," 444 U.S. at 998 (Powell, J., concurring), over the President's termination of the Taiwan treaty. Congress has completed legislative action sufficient to enact H.R. 4042 into law under the Constitution, but petitioners refuse to publish the law. Moreover, the Senate has "assert[ed] its constitutional authority" (*id.* at 997) by taking "official action" (*id.* at 998) to intervene in this action. In the case of such a "head-on confrontation[.]," *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring), respect for the courts and the vitality of the representative process will be enhanced by "this Court[s] . . . provid[ing] a resolution pursuant to our duty 'to say what the law is,'" *Goldwater*, 444 U.S. at 1001 (Powell, J., concurring) (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974)).

Because the legislative process to enact H.R. 4042 is complete, adjudication of respondents' complaint does not risk supplanting "the normal political process." *Id.* at 997. Rather, this suit seeks to vindicate the constitutionally mandated result of the representative process. Hence, it would be the denial of respondents' standing, rather than the adjudication of their action, that would frustrate the representative process and cause "a shift

away from a democratic form of government." *Richardson*, 418 U.S. at 188 (Powell, J., concurring).

II. This dispute remains a live controversy because petitioners' failure to publish H.R. 4042 continues to nullify respondents' votes. Because respondents are suing to obtain the publication of H.R. 4042, not to enforce its substantive requirements, the fact that those requirements apply to a past fiscal year is not germane to the vitality of their complaint. H.R. 4042's publication will redress respondents' live claim by effectuating their votes, irrespective of the law's substantive content. In addition, the prospective publication of H.R. 4042 continues to benefit respondents, because recognition of H.R. 4042's status as a law will require the Executive to comply with the government financial accountability statute, 31 U.S.C. § 1351 (1982), by reporting to Congress violations of H.R. 4042.

III. The court of appeals correctly held that H.R. 4042 became a law when the President failed to return the bill to the House within ten days although he was not prevented from doing so. The critical decision at the Constitutional Convention over the sharing of the lawmaking power was the Framers' determination to provide the President with only a qualified power to negative legislation, subject to Congress's override by two-thirds' vote. The Framers designed the pocket veto clause for the narrow purpose of protecting the President's opportunity to exercise his qualified power to return bills, by providing that if "Congress by their Adjournment prevent [a bill's] return, . . . it shall not be a Law." U.S. Const., art. I, sec. 7, cl. 2. This clause must be interpreted to further the limited purpose that it was designed to serve.

The President's ability to consider bills for ten days and the Congress's ability to enact bills over the President's objections are both safeguarded when the pocket veto is restricted to adjournments during which reconsideration is "prevented" because the originating House has not arranged for the acceptance of veto messages or the Congress has terminated. During a break such as the in-

tersession adjournment of the Ninety-Eighth Congress, when both Houses had appointed officers to accept veto messages, the President is not "prevented" from returning a bill for Congress to reconsider. Adherence to the Framers' design precludes the President's exercise of an absolute pocket veto in such circumstances.

This Court's previous adjudications establish that the President improperly attempted to pocket veto H.R. 4042. In the *Pocket Veto Case*, 279 U.S. 655, 680 (1929), the Court held that "the determinative question in reference to an 'adjournment' " is not what type of adjournment it is, "but whether it is one that 'prevents' the President from returning the bill." Because at that time there was no practice of Congress's accepting Presidential messages through agents during adjournments, the Court found that, in order to eliminate potential delay and uncertainty, bills could be returned only while the originating House was in session. *Id.* at 682-85. Nine years later, in *Wright v. United States*, 302 U.S. 583 (1938), the Court ruled that the President could return vetoes by delivering them to congressional agents during adjournments. The Court held that whether Congress had prevented the President from returning a bill during an adjournment depended upon "the manifest realities of the situation." *Id.* at 595. The Court approved the President's return of a bill to the Secretary of the Senate while the Senate was in recess, because it found that there was no "practical difficulty in making the return of the bill during the recess," *id.* at 589, and that during such a break its earlier concerns over delay and uncertainty were "wholly chimerical," *id.* at 595.

The "manifest realities" of Congress's modern adjournments similarly demonstrate that Congress's designation of agents to accept veto messages has eliminated all serious risk of uncertainty or undue delay. Well-established practices ensure the prompt, certain, and public recording of the fact and exact time of bills' return to Congress during adjournments. Because the Congress did not pre-

vent the return of H.R. 4042, the court of appeals correctly held that it became law.

ARGUMENT

I. RESPONDENTS HAVE STANDING TO REDRESS PETITIONERS' NULLIFICATION OF THEIR VOTES

Recognition of the standing of legislators to sue to protect the effectiveness of their votes is consistent with the Court's teaching that the standing element of the "case or controversy" requirement preserves the separation of governmental powers. Petitioners incorrectly posit that under the separation powers a governmental entity or officer can never have standing to invoke judicial redress for a legal injury to its or his governmental power. This conclusion is rebutted by a wealth of cases in which the Court has adjudicated legal disputes over the allocation of governmental power at the instance of an injured governmental entity. Instead of the arbitrary and inflexible prohibitory rule proffered by the petitioners, the Court has adopted a more reasoned approach that confers standing when doing so will serve, rather than impair, the separation of powers.

Application of this traditional approach compels the court of appeals' conclusion that adjudicating respondents' complaints fulfills the separation-of-powers principles underlying the standing requirement. Respondents have sued to redress an impairment of their constitutionally assigned legislative role under the separation of powers. Because respondents took all actions that were available to them within their legislative role before they filed this action, they are not seeking a remedy from the Court to supplant or otherwise interfere with the legislative process. Rather, they have brought to the judiciary a mature legal controversy whose resolution lies squarely within the Court's competence and traditional role. By adjudicating the dispute the Court does not risk acting outside its properly limited role or usurping the domain of the representative Branches. To the contrary, where,

as here, one of the political Branches has impaired the textual constitutional authority of its coordinate Branch, and the injured Branch has taken all possible action within its sphere to protect its role, the injured Branch's invocation of the judicial power to remedy the constitutional injury is a safe, proper, and necessary means of assuring the maintenance of the balance of separated powers among the Branches.

A. The Nullification of Legislators' Votes Inflicts Upon Them a Concrete, Cognizable Injury

Under the "case or controversy" requirement of Article III, the judicial power may be exercised only at the instance of a plaintiff who "allege[s] personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). To have Article III standing, a plaintiff must have sustained a "'distinct and palpable injury,'" *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)), "to a concrete, personal interest," *Allen v. Wright*, 468 U.S. at 756.

The Court has firmly established that legislators have a "plain, direct and adequate interest in maintaining the effectiveness of their votes" to provide them with standing to remedy an impairment of their votes. *Coleman v. Miller*, 307 U.S. 433, 438 (1939). In so doing, the Court relied principally on its earlier determinations that individual voters have a cognizable interest in maintaining the efficacy of their votes. *Id.* at 438-41 (discussing *Hawke v. Smith* (No. 1), 253 U.S. 221 (1920); *Leser v. Garnett*, 258 U.S. 130 (1922)). Since *Coleman* the Court has consistently reaffirmed the cognizability of injuries to the interests of voters. See *Baker v. Carr*, 369 U.S. 186, 206-08 (1962), and cases cited therein. In *Baker* the Court concluded that its intervening "decisions plainly support" (*id.* at 206) the conferral of standing on voters, who "seek relief in order to protect or vindicate an interest of their own," *id.* at 207. The Court has thus firmly established

the judicial cognizability of "a concrete injury to fundamental voting rights." *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974).

The respondents' status as legislators does not diminish their standing to redress the nullification of their votes. In *Coleman* the Court viewed as legally indistinguishable the standing of legislators and of voters to sue to remedy impairment of the efficacy of their votes. The Court described its individual-voter cases as "controlling authorities" for the recognition of legislator-voter standing. 307 U.S. at 441. To the extent that the Court saw fit to differentiate at all between the two types of plaintiffs, it found that the interests of individuals, who were "merely qualified voters," were "certainly much less impressive" than the interests of legislators, who "were not only qualified to vote . . . but [whose] votes . . . would have been decisive." *Ibid.* Consistent with this view, Justice Stevens, while serving on the Seventh Circuit and sitting on a three-judge district court, interpreted *Coleman* and *Baker* as establishing the standing of legislators to sue in federal court to protect the efficacy of their votes. *Dyer v. Blair*, 390 F. Supp. 1291, 1297 n.12 (N.D. Ill. 1975) (three-judge court). There is no principled distinction between *Coleman*, a suit by state legislators to vindicate their votes, which were sufficient to prevent their state's ratification of a constitutional amendment, and this action by federal legislators to vindicate their votes, which were sufficient to enact a federal law.¹

¹ Justice Stevens' reliance on *Coleman* to establish legislators' standing in *Dyer* refutes petitioners' contention, Brief for the Petitioners ("Pet. Br.") 23 n.16, that in *Coleman* the Court held that the legislators had standing only because the state court whose decision the Court was reviewing had granted them standing. If petitioners were correct that "*Coleman* does not stand for the broad proposition that all legislators have standing to bring an action in federal court on the basis of an asserted injury to their lawmaking functions," *ibid.*, then *Coleman* would have provided no authority for Justice Stevens' decision in *Dyer*, because *Dyer* was brought in federal court to redress an

Continued

Included in respondents' right to vote is the right "to have their votes counted." *United States v. Classic*, 313 U.S. 299, 325 (1941). The respondent Members of Congress alleged in their complaint that unlawful actions of the defendants "have nullified [their] votes in favor of the bill." J.A. 27.² The respondent Senate alleged that "constitutional and statutory violations of defendants have deprived the intervenor United States Senate of its constitutional role in the enactment of legislation and have nullified the votes of members of the United States Senate for the passage of H.R. 4042." J.A. 58; *accord* J.A. 90 (House complaint). Thus, respondents "have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect," *Coleman*, 307 U.S. at 438, and they have standing to redress this "concrete injury to fundamental voting rights," *Schlesinger*, 418 U.S. at 223 n.13.

B. Redress of the Nullification of Legislators' Votes Is Consistent With the Court's Adjudication of Constitutional Claims of Governmental Litigants

There can be no question that "[t]he idea of separation of powers . . . underlies standing doctrine." *Allen v. Wright*, 468 U.S. at 759. As the court of appeals and all

asserted injury to legislators' lawmaking functions. The court of appeals correctly rejected petitioners' narrow interpretation of *Coleman*. See Pet. App. 15a n.15; *cf. Phillips Petroleum Co. v. Shutts*, 105 S.Ct. 2965, 2971 (1985) (standing in federal court does not depend on state court standing).

The court of appeals also properly rejected petitioners' attempt, Pet. Br. 23 n.16, to distinguish *Coleman* on the ground that it was brought by state, not federal, legislators. The court noted the inconsistency of such a distinction in light of "the Court's emphasis [in *Coleman*] of 'the legitimate interest of public officials and administrative commissions, federal and state, to resist the endeavor to prevent the enforcement of statutes in relation to which they have official duties.'" Pet. App. 15a-16a n.15 (quoting 307 U.S. at 442) (emphasis added).

² Among the original thirty-three Member plaintiffs, Richard L. Ottinger has retired from the House of Representatives and Paul Simon has been elected to the Senate.

parties recognize, the standing principle "is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. at 498. It fulfills "Art. III[s] limit [of] the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.'" *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)).

From this unassailable fact, however, petitioners draw a sweeping and unsound conclusion. "There is," they maintain, "an irreconcilable conflict between the principles of separated powers that Article III embodies and a case, such as this one, in which a court is asked to referee an intragovernmental dispute between the political Branches, and to do so in the absence of any claim by a private party that he has been injured or that he stands to benefit as a result of the court's decision." Pet. Br. 15-16 (emphasis omitted).³ This view parallels the dissent's contention below that Article III never permits an injured governmental entity, in distinction to "a private party alleging a concrete injury," to "protect [its] governmental powers" through the courts. Pet. App. 48a.

Although such a doctrine would have the virtue of simplicity, it is not and has never been the law. Instead, the Court's standing jurisprudence has followed its admonition that "[t]he versatility of circumstances often mocks a natural desire for definitiveness." *Wiener v. United States*, 357 U.S. 349, 352 (1958). The Court has adopted a far more sophisticated and flexible approach in determin-

³ Petitioners challenged respondents' standing in this case for the first time in their petition to the court of appeals for rehearing. Prior to that filing, petitioners had conceded that the Senate has standing because it "is alleging injury to its corporate interests, that is its interests as a body in being able to consider legislation." Transcript of Appellees' Oral Argument, *Barnes v. Kline*, June 4, 1984, at 12 (filed Dec. 30, 1985 and Jan. 15, 1986, see J.A. 4).

ing when governmental entities have presented a "case" or "controversy," reflecting the Court's understanding that "those two words have an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government." *Flast v. Cohen*, 392 U.S. at 94.

This Court has adjudicated an earlier action initiated at the behest of the United States Senate to resolve a dispute with the Executive Branch over the constitutional allocation of authority between the Branches. In *United States v. Smith*, 286 U.S. 6 (1932), the Senate challenged the right of a nominee to the Federal Power Commission to hold office. After the Senate had confirmed the nomination and notified the President of the confirmation, the Senate moved to reconsider its action pursuant to its rules and requested the President to return the resolution of confirmation. When the President refused to do so, the Senate defeated the nomination upon reconsideration and requested initiation of a *quo warranto* proceeding in the name of the United States "in deference to the desire of the United States Senate to have presented for judicial decision the question whether [the nominee] holds lawfully the office." *Id.* at 26. The Executive consented to institute the proceeding, on the condition that the Senate employ its own counsel, and the Executive appeared as *amicus curiae* to defend the validity of the appointment. *Id.* at 30. Thus, although the United States was the nominal petitioner, the challenge was in reality brought by the Senate and defended by the Executive and the putative officer. As in this action, all parties to the proceeding were governmental, and only the Legislative Branch was seeking relief.⁴ Notwithstanding the case's unusual align-

⁴ The United States' nominal status as the petitioner does not meaningfully distinguish *Smith* from this action, because the Court "look[s] behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *United States v. ICC*, 337 U.S. 426, 430 (1949).

ment, the Court adjudicated the merits of the Senate's constitutional challenge.

The Court has similarly recognized the standing of governmental officers to challenge infringements to their constitutional authority from its initial enunciation of "the province and duty of the judicial department, to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). *Marbury* was an action by a putative government official for the delivery of the commission necessary to furnish him with evidence of his constitutional authority to exercise governmental power. As the Court recognized, *Marbury* was suing to obtain "the office itself. . . . He will obtain the office by obtaining the commission." *Id.* at 173. Thus, like this action, *Marbury's* suit was an effort to vindicate his right to exercise governmental authority.⁵

Indeed, the parallel between this action and *Marbury's* suit is even stronger. *Marbury* asserted that under the Constitution he had been appointed a justice of the peace for the District of Columbia. He claimed that the Secretary of State had failed to deliver his judicial commission, a ministerial duty necessary to provide him with public evidence of the completion of his appointment and, conse-

⁵ Petitioners argue that *Marbury* was alleging "an injury-in-fact to him in his private capacity." Pet. Br. 20 n.14. Analogizing *Marbury's* suit to *Powell v. McCormack*, 395 U.S. 486 (1969), petitioners state that "[t]his case, however, concerns not a private entitlement to office, but the boundaries of the powers of such an office, presented wholly apart from any private injury." Pet. Br. 20 n.14. Petitioners' identification of *Marbury* with *Powell* as a basis for standing is not apt. In *Powell* the basis for adjudicating Representative *Powell's* claim that he had been unconstitutionally excluded from office, after he had been seated following another election, rested on his "obvious and continuing interest in his withheld salary." 395 U.S. at 497. In contrast, the Court had made clear in *Marbury* that *Marbury* was not seeking a money judgment for his salary, but rather his commission, to vindicate his right to exercise the powers of his office. 5 U.S. (1 Cranch) at 173 ("The value of a public office, not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.").

quently, of his authority to perform the duties of the office. Similarly, respondents here assert that, under the Constitution, they have enacted H.R. 4042 into law, and that the petitioners have failed to perform the ministerial duties necessary to furnish public evidence of their enactment.⁶ Thus, both *Marbury* and this action were brought by governmental officers alleging that other officers' failure to perform statutorily mandated acts had deprived them of their constitutionally assigned authority.

Since *Marbury* the Court has adjudicated a number of actions by governmental officers to establish their entitlement to exercise governmental power. In *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953), the Court faced "a conflict of view between two agencies of the Government having duties in relation to the development of national water resources." *Id.* at 155. The action was brought by the Secretary of the Interior and a nonprofit association to challenge the Federal Power Commission's grant of a license to construct a power-generating station. The court of appeals had held that the Secretary lacked standing because he could not "point to some special interest for which he is charged with responsibility that may be adversely affected by the action attacked." 191 F.2d 796, 800 (4th Cir. 1951). In the Supreme Court the Secretary based his claim of standing on the "specific interest" generated by his statutorily vested duties. 345 U.S. at 156. The Court, per Justice Frankfurter, held that the Secretary had standing based on this showing and reached the merits of his claim. *Ibid.*⁷

⁶ The statute on which *Marbury* relied is the precise forerunner of the statutes underlying respondents' action. See Act of September 15, 1789, § 4, 1 Stat. 68.

⁷ The Court did not set forth its reasoning because of its view that "[i]t would not further clarification of this complicated specialty of federal jurisdiction . . . to set out the divergent grounds [within the Court] in support of standing in these cases." *Ibid.* However, it is incontestable that the Secretary was granted standing to litigate "the boundaries of the powers of [his] office." Pet. Br. 20 n.14.

In other circumstances the Court has similarly adjudicated claims of governmental power brought by governmental officers. For example, in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court recognized the right of a President to challenge a statute as an unconstitutional infringement on Presidential privilege. The Court adjudicated former President Nixon's claim of privilege while recognizing "that the privilege 'belongs to the Government and must be asserted by it: it can neither be claimed nor waived by a private party.'" *Id.* at 448 (quoting *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953)); accord *id.* at 502 (opinion of Powell, J.). The Court further held that President Nixon had standing to litigate his claim that the challenged statute violated the constitutional separation of powers. *Id.* at 439. Thus, with regard to both the Presidential privilege and the separation of powers claims, the Court conferred standing on President Nixon, in his capacity as the former President, to sue Executive Branch officials to assert claims of infringement on his governmental power.

The Court's recognition of the standing of governmental entities to adjudicate claims of infringement on their authority is equally evident in litigation involving allegations of infringement on the powers of states. For example, in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the State of South Carolina challenged the constitutionality of the Voting Rights Act of 1965. While holding that South Carolina lacked standing to raise some claims, the Court permitted South Carolina to challenge the Act's constitutionality "[a]s against the reserved powers of the States." *Id.* at 324.⁸

⁸ *Katzenbach* is only one of a number of cases in which the Court has granted a state standing to litigate an asserted infringement on its "alleged quasi sovereign rights." *Missouri v. Holland*, 252 U.S. 416, 431 (1920). In *Coleman* the Court noted that in numerous cases it had conferred standing on state officials in recognition "that they have an adequate interest in the controversy by reason of their duty to enforce the state statutes the validity of which has been drawn in question."

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C. The Recognition of Standing to Redress the Nullification of Legislators' Votes Serves the Separation of Powers

As petitioners correctly urge, separation-of-powers principles must inform the analysis of respondents' standing. However, contrary to petitioners' approach, it is an examination of the *purposes* served by the separation of powers doctrine, rather than the mere incantation of the doctrine, that illuminates the standing question in this case. Separation-of-powers analysis requires "courts [to] look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *United States v. Interstate Commerce Commission*, 337 U.S. 426, 430 (1949).

1. The Court Has Identified Three Principles Reflecting the Separation-of-Powers Concerns Implicated in Standing Analysis

The Court has identified three central separation-of-powers principles that standing analysis must reflect. First, in order to ensure "the continued effectiveness of the federal courts," *Valley Forge*, 454 U.S. at 473, the Court strives to avoid "[r]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government[, which] will not, in the long run, be beneficial to either," *id.* at 474 (quoting *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring)). Second, in order to avoid interfering with the functioning of "the normal political process," the Court refrains from intervening in disputes between the Branches that "turn on political rather than

307 U.S. at 445; see *id.* at 442-44 (citing cases). In *Coleman* the Court rejected the claim renewed in the dissent below, Pet. App. 63a n.6, that states do not have standing to allege "an injury to governmental powers," but only to challenge a "require[ment] by federal statute to expend money." Summarizing the instances in which it had granted standing to state officials, the Court concluded that "[i]n none of these cases could it be said that the state officers invoking our jurisdiction were sustaining any 'private damage.'" 307 U.S. at 445.

legal considerations." *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring).

Third, perhaps the most important separation-of-powers basis for judicial restraint rests on the relation between "the countermajoritarian implications of judicial review and the democratic principles upon which our Federal Government in the final analysis rests." *Richardson*, 418 U.S. at 192 (Powell, J., concurring). "[M]indful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch," *id.* at 188, the Court has maintained its "properly limited . . . role . . . in a democratic society," *Warth v. Seldin*, 422 U.S. at 498, by refraining from adjudicating questions that are "most appropriately addressed in the representative branches," *Valley Forge*, 454 U.S. at 475.

Where these principles apply, they provide compelling grounds for the Court to avoid adjudicating disputes. The proper separation of governmental powers is not strengthened, however, by the hollow invocation of the separation-of-powers doctrine in a case such as this one, in which none of these restraining factors is present. To the contrary, "[p]roper regard for the complex nature of our constitutional structure requires . . . that the Judicial Branch [not] shrink from a [justiciable] confrontation with the other two coequal branches of the Federal Government," just as strongly as it precludes the courts from "hospitably accept[ing] for adjudication claims of constitutional violation by other branches" that present no case or controversy. *Id.* at 474.

2. Recognizing Respondents' Standing to Vindicate Their Votes to Enact Legislation Furthers These Vital Separation-of-Powers Concerns

By filing this action to secure a declaration of the effectiveness of their votes to enact a bill into law, respondents are suing to vindicate the legislative role assigned to them by the Constitution. Because respondents have in-

voked the courts' jurisdiction to remedy an injury to the completed performance of their legislative role, the adjudication of their complaint will strengthen, not erode, the separation-of-powers principles underlying the case-or-controversy requirement.

a. Respondents Are Suing to Vindicate Their Power to Enact Laws, Not to Enforce Laws

The single goal of respondents' suit is to obtain relief from the petitioners' nullification of their votes to enact H.R. 4042 into law. Contrary to petitioners' persistent misunderstanding, respondents have asserted no right "to challenge the manner in which Executive Branch officials execute the law," Pet. Br. 13, but solely to challenge the acts of omission through which Executive officials nullified respondents' votes to enact a law.⁹ The foundation for petitioners' mischaracterization of this action as "equivalent to one expressly challenging the President's execution of the laws," *id.* at 25, is their belief that once Congress has presented a bill to the President, the legislative process is complete and the bill "has passed out of the domain of the Legislative Branch," *id.* at 22. In petitioners' view, after presentation "Members of Congress do not have any continuing, quasi-proprietary stake in a bill," and "[a]t that point, any official relation of the Federal Government to the measure devolves upon the other two Branches." *Ibid.*

Contrary to petitioners' understanding of the demarcation between the legislative and the executive processes,

⁹ Petitioners contend that respondents' suit

is nothing more than a claim that the President has failed to execute the law. The individual respondents do not and could not claim that they were denied an opportunity to vote in Congress. Their votes were fully counted and, indeed, were fully effective in securing the passage of H.R. 4042 and its presentment to the President. Thus, respondents' argument can only be that their votes have been "nullified" because the President did not adhere to the requirements of H.R. 4042 after it passed both Houses.

Id. at 21.

however, the legislative process is not complete when Congress presents a bill to the President. It continues to run under the Constitution until there has been a final determination whether a bill "shall become a Law" or "shall not be a Law." U.S. Const., art. I, sec. 7, cl. 2. Whether the President chooses to sign a bill, to return it to Congress for reconsideration, to pocket veto it, or to allow it to become a law without his signature, he is exercising a legislative, not an executive, function. As the Court has noted, the provisions of Article I, section 7 "prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *INS v. Chadha*, 462 U.S. 919, 945 (1983) (emphasis added). The qualified veto power defines the President's "role in the lawmaking process." *Id.* at 947.¹⁰

Correction of petitioners' misperception of the extent of the legislative process exposes the fallacy in their argument. Petitioners state, "[Congress's] role in the legislative process as regards H.R. 4042, which extended only to the presentment of the bill to the President, remains fully effective and effectuated, because any failure of H.R. 4042 to become a law is attributable to circumstances occurring after presentment." Pet. Br. 26. However, because the legislative process extends beyond presentment until the bill's status is final, the fact that petitioners' failure to treat H.R. 4042 as a law occurred after presentment is irrelevant to respondents' claim. Petitioners' failure to publish H.R. 4042 as a law prevented Congress's vote from being "effective and effectuated" by unconstitutionally short-circuiting the legislative process. Thus, respondents' claim presents purely a controversy about

¹⁰ Accord *id.* at 945, 947, 948, 951 (describing veto as "legislative" or "lawmaking"); *Edwards v. United States*, 286 U.S. 482, 490 (1932) ("The President acts legislatively under the Constitution. . ."); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 453 (1899) ("Undoubtedly the President when approving bills passed by Congress may be said to participate in the enactment of laws. . .").

the Article I legislative process and the efficacy of respondents' role in that process.¹¹

Petitioners maintain alternatively that the Court's decision in *INS v. Chadha* precludes respondents from litigating the lawfulness of petitioners' nullification of their votes to enact H.R. 4042. They state, "Just as Congress cannot overrule Executive action directly by means of a legislative veto, Congress cannot accomplish the same result indirectly by invoking the assistance of the federal courts. . . ." Pet. Br. 18. Petitioners do not explain the basis for their contention that respondents' vindication, through the judicial process, of their votes to enact H.R. 4042 into law would give Congress "an overruling influence over the other[] [branches] in the administration of their respective duties." *Id.* at 18 (quoting *The Federalist* No. 48). Respondents seek only to preserve their legislative role from the President's attempt to use the pocket veto power to prevent Congress from overriding his vetoes. As long as Congress is operating within its assigned legislative sphere, the courts have recognized Congress's right, acting outside the constraints of bicameral action and presentation, to invoke the jurisdiction of the federal courts by instituting civil actions when necessary to effectuate its performance of its legislative functions.¹²

¹¹ The President's performance of his Article II duty to execute the laws is simply not involved in this lawsuit. H.R. 4042 imposed particular reporting duties upon the President, Pet. App. 142a-145a, but respondents have not sued the President, because they are not seeking to force the President to perform any duties. Instead, respondents sued the two Executive officials who have the responsibility to complete the lawmaking process by causing enacted laws to be published. It is these officials who have injured respondents by nullifying their votes to enact H.R. 4042. See pages 28-32 *infra*.

¹² See, e.g., *In re Application of the United States Senate Permanent Subcommittee on Investigations (Cammisano)*, 655 F.2d 1232 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981) (initiation of action by congressional committee for enforcement of subpoena through civil contempt power); *United States v. American Telephone and Telegraph Co.*, 551 F.2d 384, 391 (D.C. Cir. 1976) (a House of Congress "has standing to assert its
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b. Recognizing Respondents' Standing to Redress the Nullification of Congress's Lawmaking Power Serves the Separation-of-Powers Principles Identified by the Court

Recognition of respondents' standing is fully consistent with the separation-of-powers principles that underlie the Court's standing doctrine. Because the Branches have reached constitutional impasse on a question that requires legal and not political resolution, adjudication of this dispute will neither generate unnecessary confrontation between the Branches nor interfere with the political process. Indeed, resolution of respondents' claim will preserve the separation of powers, by safeguarding the constitutional process for lawmaking.

First, this is not a case in which "we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches." *Goldwater v. Carter*, 444 U.S. at 998 (Powell, J., concurring). To the contrary, "the political branches [have] reach[ed] a constitutional impasse." *Id.* at 997. The Congress completed bicameral action on H.R. 4042 and sent it to the President for his approval or veto. Although the President failed to return the bill to Congress with his objections, the President's subordinates, acting under his instructions, have refused to publish the bill as a law.

By passing and presenting H.R. 4042, which is all that Congress can do, and indeed all that it is required to do under the Constitution, to enact a law, Congress took the

investigatory power" by appealing from issuance of injunction against complying with subpoena); *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (en banc) (dismissing on merits suit brought by congressional committee for enforcement of subpoena).

It is petitioners' position that the only manner in which respondents can vindicate their votes to enact H.R. 4042 into law is to pass a new law. Pet. Br. 18. They do not explain how Congress's exercise of its authority to pass a new bill, which would be equally subject as H.R. 4042 to the petitioners' potential refusal to publish it as a law, would redress respondents' injuries.

"official action," *id.* at 998, that assures "an actual confrontation between the Legislative and Executive Branches," *ibid.* It is beyond contention that "the normal political process has [no] opportunity to resolve the conflict" over the President's exercise of a pocket veto. *Id.* at 997. The individual respondents accordingly sued to obtain a declaration that petitioners' actions unlawfully nullified their votes.

The existence of "a constitutional impasse" between the political Branches, *ibid.*, is further demonstrated by the Senate's "assert[ion of] its constitutional authority," *ibid.*, by the adoption of Senate Resolution 313, 98th Congress, directing its Legal Counsel to intervene in this action in order to "protect[] the constitutional authority of the Congress to enact laws over the objections of the President." 130 Cong. Rec. S224 (daily ed. Jan. 26, 1984) (Sen. Baker).¹³ Congress's constitutionally sufficient vote

¹³ The Senate determined to seek relief in this action under its statutory authority to intervene in "any legal action . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue." 2 U.S.C. § 288e(a) (1982). Of course, the Senate's intervention requires Article III standing. See *id.* (authorizing intervention "only if standing to intervene exists under section 2 of article III"). However, the intervention statute serves to "expand standing to the full extent permitted by Art. III, thus permitting litigation by one 'who otherwise would be barred by prudential standing rules.'" *Gladstone*, 441 U.S. at 100 (quoting *Warth*, 422 U.S. at 501); accord *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring).

In the court of appeals, both the majority and the dissent viewed the constitutional issues of the Senate's standing and that of individual legislators as identical. Pet. App. 15a, 17a & n.16, 49a n.1. The Court need not reach the question whether the individual legislators would have had standing without the presence of their "collegial bodies," *Bender v. Williamsport Area School District*, No. 84-773, slip op. at 9-10 (Mar. 25, 1986), because the Senate is a party. See *Bowsher v. Synar*, No. 85-1377, slip op. at 5 (July 7, 1986). It is irrelevant that individual legislators initiated this action and that the Senate intervened. The identical situation existed in *Bowsher*, in which the only appellee who the Court held had standing not only was an intervenor, but had in-

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to enact H.R. 4042 and the Senate's formal intervention resolution both constitute "appropriate formal action," *Goldwater*, 444 U.S. at 1002 (Powell, J., concurring), manifesting that "the President and the Congress ha[ve] reached irreconcilable positions," *id.* at 1001.¹⁴

Where such a "head-on confrontation[]," *Richardson*, 418 U.S. at 188 (Powell, J., concurring), between the political Branches has occurred, neither the "public confidence essential" to the courts, nor the "vitality critical" to the political Branches, *ibid.*, would be enhanced by a judicial refusal to adjudicate the dispute and redress the constitutional injury. To the contrary, "shrink[ing]" from the Court's "duty . . . to give full effect to the provisions of the Constitution relating to the enactment of laws," *Chadha*, 462 U.S. at 943 (quoting *Field v. Clark*, 143 U.S. 649, 670 (1892)), by permitting the abrogation of the constitutional design, would erode public confidence and undermine the vitality of the representative system. As the

tervened initially in the Supreme Court. *Bowsher*, slip op. at 5; 106 S.Ct. 1488 (1986) (granting motion for leave to add party plaintiff). Although the Senate currently provides a mechanism only for intervening in previously filed court actions, this intervention statute would not bar the Senate from resolving to initiate an action to protect its legislative interests. See, e.g., S. Res. 415, 73d Cong., 3d Sess. (1931) (authorizing initiation of civil action in name of Senate if Executive declined to initiate *quo warranto* proceeding to test Senate's power to reconsider confirmation of Presidential nominee, see p. 11 *supra*).

¹⁴ The individual plaintiffs and the Senate were joined by the Speaker and Bipartisan Leadership Group of the United States House of Representatives, who intervened to represent the House's interests. J.A. 85-86. This House group recently represented the House's interests in "defend[ing] the validity of a statute," *Chadha*, 462 U.S. at 940, in this Court in *O'Neill v. Synar*, No. 85-1379 (July 7, 1986), which the Court decided along with its companion cases, *Bowsher v. Synar* and *United States Senate v. Synar*. Contrary to petitioners' suggestion, Pet. Br. 27 n.20, even without the House parties' intervention, the Senate would have had standing to protect its constitutional interests alone, just as a majority of the members of one house of a bicameral state legislature, see *Coleman*, 307 U.S. 433, and a head of an executive department, see *Chapman*, 345 U.S. 153, have standing to vindicate their authority.

Court has observed, "[W]e have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959. Where "the President and the Congress ha[ve] reached irreconcilable positions," as in this case, "[t]he specter of the Federal Government brought to a halt because of the[ir] mutual intransigence . . . require[s] this Court to provide a resolution pursuant to our duty 'to say what the law is.'" *Goldwater*, 444 U.S. at 1001 (Powell, J., concurring) (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974)). The court of appeals soundly concluded that, "[b]y defining the respective roles of the two branches in the enactment process, this court will help to preserve, not defeat, the separation of powers." Pet. App. 18a.

The second factor demonstrating that a grant of standing to respondents is consistent with the separation of powers is that both the Congress and the President have taken all legislative actions that they ever will take on H.R. 4042. Adjudication does not risk interfering with or supplanting the political process, because respondents do not "seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict." *Goldwater*, 444 U.S. at 997 (Powell, J., concurring). Petitioners are simply wrong when they assert that recognition of respondents' standing "would allow . . . Members of Congress to circumvent the 'intensely practical' process of 'compromise and accommodation' that is essential to the day-to-day 'business of government.'" Pet. Br. 24 (quoting Pet. App. 78a (Bork, J., dissenting)).¹⁵

¹⁵ As the court of appeals explained, this suit is wholly unlike numerous cases in which "a concern for the separation of powers has led this court consistently to dismiss actions by individual congressmen whose real grievance consists of their having failed to persuade their fellow legislators of their point of view, and who seek the court's aid in overturning the results of the legislative process." Pet. App. 13a-14a (citing cases). In contrast, in this case "[t]he court is not being asked to provide relief to legislators who failed to gain their ends in the legisla-

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As this Court has made clear, the Constitution's "single, finely wrought . . . procedure" for lawmaking, *Chadha*, 462 U.S. at 951, is not open to compromise or accommodation. *Id.* at 940-43, 957-59. Respondents, moreover, did not sue to "circumvent" the political process. To the contrary, the political process has been completed, and respondents have sued only to vindicate the result of that process. The constitutional question whether H.R. 4042 has become a law does not "turn on political rather than legal considerations." *Goldwater*, 444 U.S. at 997 (Powell, J., concurring). Therefore, the Court's "dec[isi]on whether one branch of our Government has impinged upon the power of another," *id.* at 1001, presents no threat of an intrusion into the political process.¹⁶

tive arena. Rather, the legislators' dispute is solely with the executive branch." *Id.* at 15a.

Petitioners themselves previously understood,

This is not a dispute among members of Congress in which they have come to the Court to settle for them. . . . And in that sense it is different from *Goldwater v. Carter* and different from many of the congressional standing cases we have where individual Congressmen failed to persuade their brethren to adopt their point of view and asked the courts to do their dirty work for them. Here we have an institution, the Senate, by resolution and statutory authority appearing, and we think that is distinguishable under these circumstances.

Transcript of Appellees' Oral Argument, *Barnes v. Kline*, June 4, 1984, at 14 (filed Dec. 30, 1985 and Jan. 15, 1986, see J.A. 4); accord *Coleman*, 307 U.S. at 441 ("This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution. . . .").

¹⁶ The prerequisite that a Branch take official action within its sphere before initiating legal action to protect its role may have different applications in different settings. Because the Legislative Branch acts in a legislative capacity, Congress's enactment of legislation completes the possible action within its assigned sphere. In contrast, because the Executive Branch acts to execute the laws, it may take executive action to protect its constitutional prerogatives before seeking assistance from the courts. See, e.g., *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (President's removal of independent officer notwithstanding statutory prohibition precipitated adjudication of President's constitutional removal power).

Finally, recognition of respondents' standing to vindicate the nullification of their votes to enact H.R. 4042 does not expand the role of the courts beyond their proper limits in our representative democracy. To the contrary, respect for the separation of powers mandates the adjudication of respondents' complaint, because to "maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." *Chadha*, 462 U.S. at 958. Respondents sued to redress the nullification of their role under the "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define the respective functions of the Congress and of the Executive in the legislative process." *Id.* at 945. The preclusion of a judicial resolution of this controversy out of respect for the limited role of the courts vis-a-vis the political Branches would stand the separation of powers doctrine squarely on its head. Cf. *Chadha v. INS*, 634 F.2d 408, 419 (9th Cir. 1980), *aff'd*, 462 U.S. 919 (1983).

When the courts are asked to resolve questions that the Framers reserved for political deliberation, the assumption of jurisdiction improperly would "shift away from a democratic form of government." *Richardson*, 418 U.S. at 188 (Powell, J., concurring). This case, however, like *Chadha*, presents a purely legal question about the constitutionally mandated procedures for political deliberation. Respondents seek to vindicate the constitutional process by which elected representatives act to fulfill the will of the electorate. It is one thing for the courts to decline to adjudicate grievances that are "most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475. It would be another thing altogether for the courts, in the name of the primacy of the representative process, to refuse to adjudicate this controversy, which seeks solely to vindicate the result produced by the representative process. In this case it would be the refusal to adjudicate respondents' complaint, not the recognition of their standing, that would bring "a shift away from a democratic form of government."

"Our system of government leaves many crucial decisions to the political processes." *Schlesinger*, 418 U.S. at 227. For example, the substantive question governed by H.R. 4042—whether, as a matter of policy, the United States government should provide assistance to another nation's government, and, if so, under what conditions—is an issue whose resolution is committed exclusively to the political Branches. However, once the political processes have produced a decision on this question, the courts' fulfillment of their duty "to say what the law is," *Marbury*, 5 U.S. (1 Cranch) at 177, does not intrude into the political process. Rather, in this context the judiciary's performance of its adjudicatory function strengthens the democratic process by securing adherence to constitutional processes and mandating the legislative results that were produced by the representative Branches under the Constitution.¹⁷

¹⁷ Petitioners claim that the maintenance of this suit "resembles the proposal, rejected by the Constitutional Convention, for joining members of the Judiciary in a council of revision to review all bills passed by the National Legislature." Pet. Br. 16 n.10. The two have transparently nothing in common. Respondents do not seek judicial participation in the decision over the wisdom or desirability of enacting H.R. 4042, which under our system is committed exclusively to the political Branches. Instead, they seek "no more than an interpretation of the Constitution, . . . [which] falls within the traditional role accorded courts to interpret the law." *Powell v. McCormack*, 395 U.S. 486, 548 (1969). Indeed, Elbridge Gerry, the prime opponent of the proposal to include the judiciary in a council of revision, objected to the courts' judging "the policy of public measures," precisely in recognition of the judiciary's "power of deciding on their Constitutionality." 1 *The Records of the Federal Convention of 1787*, at 97-98 (J. Madison) (M. Farrand ed. 1966) [hereinafter cited as Farrand].

Petitioners concede that respondents' complaint does not present a political question, as they must under the *Pocket Veto Case*, 279 U.S. 655 (1929), and *Wright v. United States*, 302 U.S. 583 (1938). Like the plaintiffs in these earlier pocket veto cases, respondents seek only the exercise of the courts' traditional role of adjudicating "cases of a Judiciary Nature." 2 Farrand at 430. The irony of petitioners' invoking the rejected council of revision, which would have possessed the power to negative the Legislature's enactment of laws, should not be lost, in this suit to redress the President's abuse of his qualified veto power.

In order to be able properly to leave political decisions to the political processes, the Court has a special role in safeguarding the political process itself, including the legislative process. The Court has recognized that remitting a litigant to the exercise of his "right to assert his views in the political forum or at the polls," *Richardson*, 418 U.S. at 179, requires a judicial willingness to police the electoral process, because "[o]ther rights, even the most basic, are illusory if the right to vote is undermined," *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Justice Powell has accordingly described *Baker v. Carr* as "perhaps a necessary response to the manifest distortion of democratic principles practiced by malapportioned legislatures and to abuses of the political system so pervasive as to undermine democratic processes." *Richardson*, 418 U.S. at 195 n.17 (Powell, J., concurring).¹⁸ Similarly, recognition of the prudential "rule barring adjudication of generalized grievances more appropriately addressed in the representative branches," *Allen v. Wright*, 468 U.S. at 751, requires a correlative judicial willingness to enforce an outcome, such as the enactment of H.R. 4042 into law, that was produced by the representative process.¹⁹

¹⁸ Accord J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 73-104 (1980) (viewing central function of judicial review as reinforcing representative system by policing representative process in order to leave selection of substantive values to political process); Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 Harv. L. Rev. 1265, 1298 (1961) ("It is possible, indeed, to regard the enforcement of the election laws as unique. If the citizen is to be remitted to 'the political process' for protection, he has a strong argument for enforcement of the legally established conditions of the franchise.").

¹⁹ Because "the law of Art. III standing is built on a single basic idea—the idea of separation of powers," *Allen v. Wright*, 468 U.S. at 752, we have analyzed the separation-of-powers implications as a question of Article III standing. However, because "case-or-controversy considerations 'obviously shade into those determining whether the complaint states a sound basis for equitable relief,'" *Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)), prudential doctrines have been applied to reflect the separa-

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D. Respondents Have Standing to Require Petitioners to Perform Ministerial Duties Necessary to Effectuate Their Votes

In order to vindicate the effectiveness of their votes to enact H.R. 4042 into law, respondents sued to require the petitioners to perform ministerial duties that implement the constitutional design for the legislative process by requiring the preservation and publication of bills that have become law. 1 U.S.C. §§ 106a, 112, 113 (Supp. III 1985) (requiring Archivist to receive, to preserve, and to publish all bills that have become law). Respondents have standing to obtain a judicial declaration that petitioners are required to perform the ministerial duties required by these laws.

Petitioners contend that respondents lack standing to compel adherence to these requirements, because they believe that "[r]espondents have nothing more than a 'generalized interest' (*Reservists*, 418 U.S. at 217), shared by all citizens, in the availability of public notice of the laws of the United States." Pet. Br. 28. Further, they argue that the statutes requiring preservation and publication of laws create no "right of action by Congress or anyone else to litigate" the constitutional question of whether H.R. 4042 became a law. *Id.* at 29.²⁰

tion-of-powers concerns implicated by congressional-plaintiff actions. See, e.g., *Goldwater*, 444 U.S. at 997-1002 (Powell, J., concurring) (ripeness); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 877-82 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981) (equitable discretion); McGowan, *Congressmen in Court: The New Plaintiffs*, 15 Ga. L. Rev. 241 (1981) (same). For the reasons we have discussed, separation-of-powers considerations support the adjudication of this action, whether viewed through standing doctrine or prudential analysis.

²⁰ Petitioners also dispute their amenability to suit, because "whether a particular bill has become a law is a matter to be resolved by the delivering official (here the President), not by the Archivist," and because the Executive Clerk of the White House, who acts as the President's agent in delivering bills, is not explicitly mentioned by statute. Pet. Br. 30 n.23. Respondents sued the same officers, the Administrator of General Services and the Executive Clerk of the White House,

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Petitioners misconceive the basis for respondents' standing, which, as we have discussed above, inheres in their interest in vindicating the effectiveness of their votes. Respondents do not assert that the preservation and publication statutes confer upon them a basis for standing that exists independently of their cognizable interest in vindicating their votes to enact H.R. 4042. Rather, respondents have standing to seek an order requiring petitioners to perform these ministerial duties, because it is petitioners' failure to do so that has nullified respondents' votes. Respondents' "injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)).

In putting into effect the Constitution that many of its members had participated in drafting, the First Congress enacted into law its understanding that the preservation of laws is the natural completion of the process of their enactment, by enacting the predecessor to the statutes at

who have been named as defendants, without objection from petitioners' predecessors, in previous congressional challenges to pocket vetoes. *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976). Following the statutory transfer of duties from the GSA Administrator to the Archivist, see National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, § 107(d), 98 Stat. 2291 (amending 1 U.S.C. §§ 106a, 112, 113 (Supp. III 1985)), the Acting Archivist was substituted as a defendant for the Administrator.

Respondents sued petitioners because of their contention that the Executive Clerk has the duty "to deliver [bills] that have become law to the [Archivist] for publication" and the Archivist has the duty "to receive bills that have become law and publish them." J.A. 23; J.A. 58. In two and one-half years of litigation, the petitioners have never questioned the accuracy of that description of their responsibilities. Having failed to raise such an objection in a timely manner, so that respondents could have conducted discovery relating to petitioners' job duties or amended their complaints if necessary, petitioners cannot present initially to this Court a question over their amenability to suit, which is beyond the scope of the questions presented by their petition for certiorari.

issue today. The First Congress assigned to the Secretary of State the duty to receive from the President and to "carefully preserve the originals" of all bills that had become law, including those bills that became law for not having been returned to the Congress with objections. Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. Respondents seek the performance of the identical duty by the Acting Archivist, who has inherited the Secretary of State's original responsibility of preserving enacted laws. 1 U.S.C. § 106a (Supp. III 1985).

In addition to preservation, the First Congress established the related principle that completion of the law-making process requires the recording and publication of the laws. It charged the Secretary of State with the duty, on receiving bills that had become law, to "cause the same to be recorded in books to be provided for the purpose," to publish them in public newspapers, and to "cause one printed copy to be delivered to each Senator and Representative of the United States, and two printed copies duly authenticated to be sent to the Executive authority of each State." Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. Recording and publication are now merged in the requirement that the Archivist cause the publication in slip form of "every Act and joint resolution, as soon as possible after its approval by the President, or after it has become a law under the Constitution without his approval." 44 U.S.C. §§ 709-710 (1982 & Supp. II 1984). The Archivist must also cause the publication in the Statutes at Large of "all the laws . . . enacted during each regular session of Congress." 1 U.S.C. § 112 (Supp. III 1985).

Just as the First Congress charged the Secretary of State with the duty of delivering to each Senator and Representative a copy of each printed law, current law continues to reflect Congress's direct interest in the receipt of printed evidence of its laws by requiring the Archivist to cause the publication of all laws and by permitting Congress's "Joint Committee on Printing [to] control

the number and distribution of the copies" of the slip laws and the Statutes at Large in which they are published. 44 U.S.C. §§ 709, 728 (1982).²¹ Thus, respondents remain explicit beneficiaries of the requirement that enacted laws be published, and they are "within 'the zone of interests to be protected,'" *Valley Forge*, 454 U.S. at 475 (quoting *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 153 (1970)), by the publication requirement.

Petitioners slight respondents' interest in compelling adherence to the statutory preservation and publication requirements by analogizing this action to an attempt to obtain "notice of H.R. 4042," Pet. Br. 28, or "a copy of a bill that had become a law," *id.* at 29. Petitioners' injury to respondents' legislative role does not lie in petitioners' failure to provide notice or copies of H.R. 4042 to respondents, but in their failure to perform the duties necessary to complete the process by which H.R. 4042 was enacted into law. This Court has noted, in referring to a law that had received the President's approval, that "when a bill thus attested [by the presiding officer of each House], receives his approval, *and is deposited in the public archives*, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable." *Field v. Clark*, 143 U.S. 649, 672 (1892) (emphasis added). Further, under federal law the "Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States, . . ." 1 U.S.C. § 112 (Supp. III 1985); *see id.*, § 113 (same for slip laws).

Thus, it is the publication of a statute and its preservation in the National Archives that provide the official notice of its enactment to the public. Once a statute has

²¹ Current law has altered the means of *distribution* to Congress of published laws from the individuated distribution provided in 1789. However, notwithstanding the characterization of aspects of the earlier law as "archaic" (Pet. Br. 29 (quoting S. Rep. No. 1714, 82d Cong., 2d Sess. 2 (1952))), the basic publication requirement continues without change to reflect Congress's interest in receiving printed copies of all enacted laws.

been published and preserved, any party may take notice of it and is free to initiate legal action, if necessary, to secure its benefits. However, before a bill has been "deposited in the public archives its authentication as a bill that has passed Congress" is not "complete and unimpeachable," and before it has been published, it is not contained in the body of "legal evidence of laws . . . in . . . the courts." Until petitioners perform their statutory duties of preserving and publishing H.R. 4042 as a law, the legislative process has not been completed and petitioners continue to inflict upon respondents the injury of nullifying their enactment.

II. THIS REMAINS A LIVE CONTROVERSY

This dispute remains a live, justiciable controversy, because the petitioners' refusal to preserve and publish H.R. 4042 as a law continues to injure respondents. Petitioners' suggestion that the action is moot rests upon their view that its vitality is dependent upon the current fiscal consequences of H.R. 4042. This argument fails because, like petitioners' challenge to respondents' standing, it is based upon a mischaracterization of the suit as an attempt to enforce the substantive provisions of H.R. 4042. Because respondents seek to enforce, not H.R. 4042, but the statutory provisions that implement the legislative process by requiring the preservation and publication of enacted laws, the existence of a justiciable controversy is not determined by the current substantive effect of H.R. 4042.

Beginning with the First Congress, the Congress has required the publication of "every" law. Act of September 15, 1789, ch. 14, § 2, 1 Stat. 68. When the Congress first provided for a permanent official record of its enactments in the Statutes at Large, it directed the Attorney General to enter into a contract with Little and Brown for a work containing all laws "whether obsolete, repealed, or in force, and whether temporary or permanent. . . ." Act of March 3, 1845, No. 10, § 2, 5 Stat. 798, 799. The Archivist must include in the Statutes at Large "all" the laws "en-

acted during each regular session of Congress." 1 U.S.C. § 112 (Supp. III 1985). In performing these ministerial functions, the petitioners must cause to be published all bills that have become law without judging the effectiveness of any of them. Neither Congress's interest in the preservation and publication of laws that it has enacted, nor petitioners' correlative procedural duties under statute, are affected in any way by the substantive content of the laws.

The cases regarding subsequent changes in law, which petitioners cite to suggest that this controversy is moot, Pet. Br. 10, are therefore inapposite. It is undoubtedly true that a suit to challenge or to enforce a statute is moot once that statute has been repealed. *Kremens v. Bartley*, 431 U.S. 119, 128-29 (1977); *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972) (per curiam). Here, however, the preservation and publication statutes that respondents sued to enforce have not been repealed since this action was filed, but remain in full force and effect.²²

The Court's analysis in *Coleman* demonstrates that the cognizability of respondents' interests is not affected by the current effect of the law whose publication they seek. In *Coleman* the Court held that a group of Kansas state legislators had a cognizable "interest in maintaining the effectiveness of their votes," 307 U.S. at 438, without ascertaining the substantive effect of their votes. The legislators were not required to demonstrate that their vote on Kansas's ratification of a constitutional amendment would determinatively affect the ultimate ratification or failure of the amendment. Rather, the Court found that the legislators had standing to obtain a simple determination whether Kansas was to be recorded as having ratified the amendment. Respondents have a similarly cognizable interest in securing a declaratory judgment that

²² The only change that has been made in these laws is a transfer of identical duties from the Administrator of General Services to the Archivist to reflect the Archives' separation from GSA. See n. 20 *supra*.

H.R. 4042 is a law that must be preserved and published.²³

To the extent that the current effectiveness of H.R. 4042 is an issue, there are continuing legal consequences to the question whether H.R. 4042 was a duly enacted limitation on appropriations during fiscal year 1984. The financial accountability laws of the United States require that consideration be given, after the end of a fiscal year, to the lawfulness of expenditures under all laws that were in effect during that year. The Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1) (1982), prohibits federal employees from authorizing the expenditure of funds beyond appro-

²³ *National Organization for Women, Inc. v. Idaho*, 459 U.S. 809 (1982), does not undermine the vitality of respondents' claim. In *NOW* the Court ordered dismissed as moot a challenge to practices regarding ratification of the Equal Rights Amendment. The Administrator of General Services, who had the statutory duty to record states' ratification votes, contended successfully that, because the extended date for ratification of the Amendment had expired, "the Amendment has failed of adoption no matter what the resolution of the legal issues presented here, and the Administrator . . . will not certify to Congress that the Amendment has been adopted." Memorandum for the Administrator of General Services Suggesting Mootness at 3, *NOW v. Idaho*. Here, in contrast, if the Court affirms, petitioners will be obliged to cause H.R. 4042 to be published as a law. Unlike *NOW*, respondents do not claim a cognizable interest in obtaining the recordation in the House or Senate Journals of their futile votes in favor of a defeated measure. Rather, they seek vindication of their votes that succeeded in enacting a law.

Petitioners miss the import of this distinction when they state that H.R. 4042 "can enjoy no greater legal status at this late date than could the unsuccessful constitutional amendment at issue in *NOW*." Pet. Br. 12 n.7. The source for petitioners' confusion is apparent in their statement that "[r]egardless of whether H.R. 4042 ever *was* a law, it plainly is not *now* a law, and no form of judicial relief can change that fact." *Id.* at 9 (emphasis in original). For purposes of art. I, § 7, only consistency with the mandated process for lawmaking is relevant to the identification of enacted laws. The substantive effect of legislation is not germane to its status as an enacted law under Article I. Thus, respondents' continued interest in securing H.R. 4042's preservation and publication as a law is not diminished by attenuation of the bill's substantive effect.

priations limitations. The Act is violated by an expenditure of funds in disregard of a substantive spending limitation as well as by an expenditure in excess of appropriated amounts. 60 Comp. Gen. 440 (1981). Therefore, if H.R. 4042 is a law, the Anti-Deficiency Act would render unlawful any expenditures of funds that occurred in fiscal 1984 in disregard of the requirements contained in H.R. 4042.

The requirements of the Anti-Deficiency Act do not erode with the end of a particular fiscal year. The Act requires that, "[i]f an officer or employee of an executive agency . . . violates section 1341(a) . . . of this title [31 U.S.C.], the head of the agency . . . shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. § 1351 (1982). The Act contains no statute of limitations extinguishing this reporting obligation. Thus, if H.R. 4042 is a law, the Secretary of State is obligated by law to "report immediately to the . . . Congress all relevant facts and a statement of actions taken" relative to any expenditure of funds that occurred in fiscal year 1984 in disregard of the restrictions of H.R. 4042. If it were necessary to show a continuing legally cognizable interest of the Congress in the status of H.R. 4042 beyond the vindication of its role in the lawmaking process, this statutory reporting obligation, owed directly to the Congress, would establish the requisite continuing injury to respondents from petitioners' failure to preserve and to publish H.R. 4042 as a law.²⁴

²⁴ The Secretary of State might well report that, because the expenditures in disregard of H.R. 4042 were made in a good-faith belief that H.R. 4042 was not a law, remedial action against the expending officials, see *id.*, §§ 1349(a), 1350, is not warranted. It is likewise possible that the Secretary would report that it is impossible to recoup the unlawfully expended funds. Notwithstanding the possibility of those ultimate results, the determination that H.R. 4042 is a law will have the direct legal consequence of requiring the Secretary of State to report to the Congress on any funds expended in violation of H.R.

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In addition, all executive agencies are required to audit their financial accounts. *Id.*, § 3521. The Comptroller General of the United States shares authority, acting as an agent of the Congress, see *Bowsher v. Synar*, slip op. at 11-16, to audit, 31 U.S.C. §§ 3523-3525 (1982), and to settle the accounts, *id.*, § 3526, of executive agencies. Any official who certifies the payment of a voucher that is prohibited by law is legally responsible, unless he is properly relieved, for repaying the amount. *Id.*, § 3528. It is possible that the good-faith belief of certifying officials that H.R. 4042 was not a law would warrant relieving them of legal liability to repay any unlawful expenditures. *Id.*, § 3528(b)(2)(A). Nevertheless, the account-settlement process is not complete until three years have passed from the submission of accounts for the period covered by the account. *Id.*, § 3526(c)(1); 62 Comp. Gen. 498, 502 (1983). Thus, until October 1987 at the earliest—three years from the close of fiscal year 1984—the Comptroller General will continue to have the statutory obligation to settle the accounts covered by H.R. 4042 as necessary.²⁵ Because the Comptroller General performs his auditing duties on behalf of the Congress, see *Bowsher*, slip op. at 15-16, respondents are the direct beneficiaries of this activity. Accordingly, respondents continue to be entitled to a determination that H.R. 4042 is a law.

4042. Congress's entitlement to receive this report establishes its continued benefit resulting from the publication of H.R. 4042 as a law, regardless of the nature of the administrative actions described in the report.

²⁵ To assure that agency records are available for audits by the Comptroller General, the Comptroller General may require agencies to keep records for a period of not more than ten years. *Id.*, § 3523(c)(1).

III. H.R. 4042 IS A LAW BECAUSE THE ADJOURNMENT OF THE FIRST SESSION OF THE NINETY-EIGHTH CONGRESS DID NOT PREVENT THE PRESIDENT FROM RETURNING H.R. 4042 WITH HIS OBJECTIONS

A. The Scope of the Pocket Veto Power Is Circumscribed by Its Narrow Rationale

The Constitution permits use of a pocket veto only when Congress has "prevented" a bill's return. Therefore, the narrow question posed by the merits of this case is whether the President was prevented from returning H.R. 4042 to the Congress with his objections. Because a pocket veto is not subject to Congress's authority to override, the delineation of the scope of the pocket veto power is critical to the division of the lawmaking responsibility between the political Branches. The provisions of Article I that "define the respective functions of the Congress and of the Executive in the legislative process. . . . are integral parts of the constitutional design for the separation of powers." *Chadha*, 462 U.S. at 945, 946. "[T]o vindicate the principle of separation of powers . . . the purposes underlying the[se provisions must] . . . guide our resolution of the important question presented. . . ." *Id.* at 946. The proceedings at the Constitutional Convention demonstrate that the pocket veto power was designed as a narrow, defensive mechanism to safeguard the President's ability to require Congress to reconsider bills, not as an offensive device to foreclose the possibility of reconsideration.

The Framers determined that the opportunity for Congress to override Presidential vetoes was an essential element of the lawmaking process. Thus, they gave to the President only a "*limited and qualified power* to nullify proposed legislation by veto." *Id.* at 947 (emphasis added). In extended debate, the Framers roundly criticized an alternative proposal to give the President an absolute veto. Benjamin Franklin objected that such a power would render "the Legislature into a compleat subjection to the

will of the Executive." 1 Farrand at 99. Roger Sherman spoke against "enabling any one man to stop the will of the whole," because "[n]o one man could be found so far above all the rest in wisdom." *Ibid.* George Mason believed that an absolute veto would "give up all the rights of the people to a single Magistrate." *Id.* at 102. When the proposal for an absolute Presidential veto came to a vote, the Convention rejected it unanimously.²⁶

By providing the President with a qualified veto, subject to override by two-thirds' vote of both Houses of Congress, the Framers accepted the view that "we ought to avail ourselves of his wisdom in revising the laws, but not permit him to overrule the decided and cool opinions of the Legislature." *Id.* at 99 (Roger Sherman). Accordingly, an essential element of the Constitution's "finely wrought and exhaustively considered" lawmaking procedure, *Chadha*, 462 U.S. at 951, requires that all bills be presented to the President for his signature or disapproval, and that "[t]he President's unilateral veto power, in turn, [i]s limited by the power of two-thirds of both Houses of Congress to overrule a veto thereby precluding final arbitrary action of one person." *Ibid.* Because the pocket veto functions as an absolute veto, the Court must be principally guided in interpreting its scope by the fundamental importance with which the Framers viewed Congress's power to override a Presidential veto.²⁷

²⁶ The absolute veto was rejected by a vote of ten states to none, *id.* at 103, with only three members of the Convention recorded in support, *id.* at 108.

²⁷ Prime among the elements that Alexander Hamilton noted as distinguishing the Executive under the Constitution from the British monarchy was that "[t]he qualified negative of the President differs widely from th[e] absolute negative of the British sovereign. . . ." *The Federalist No. 69*, at 445 (B. Wright ed. 1961). Hamilton's description manifests that the Framers did not even view the President's authority as a "veto," a word that does not appear in the Constitution, but as the "power of returning all bills with objections." *The Federalist No. 73*, at 468.

As the Court has explained, the veto provisions contained in Article I, Section 7, Clause 2 were created to protect the integrity of the carefully balanced system that the Framers designed for sharing legislative power between the Branches:

The constitutional provisions have two fundamental purposes; (1) that the President shall have suitable opportunity to consider the bills presented to him, and (2) that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes. *Edwards v. United States*, 286 U.S. 482, 486 [(1932)].

Wright v. United States, 302 U.S. 583, 596 (1938). The Court has been careful "not. [to] adopt a construction which would frustrate either of these purposes." *Ibid.* To maintain both purposes, use of the pocket veto power must be limited to its intended defensive function: to ensure that the President has a full ten days to consider whether to approve or to veto legislation and may effectuate a veto within that time by returning the bill to the Congress. If Congress attempts to deprive the President of the use of the full ten-day period or of the opportunity to return a bill, the provision guarantees that he will be able to veto bills notwithstanding Congress's actions. However, if Congress provides the President with both the full ten days to consider legislation and the ability to return a veto—as Congress did here, by the originating House's appointment of an agent to receive messages from the President—the Constitution mandates "that the Congress shall have suitable opportunity to consider his objections" and to override his veto.²⁸

²⁸ *Ibid.* As this Court has recognized, the pocket veto is the counterpart to the ten-day limit on Presidential consideration of enacted bills. *Edwards*, 286 U.S. at 486; accord *Pet. App. 22a-23a*. Just as the ten-day limit ensures that the President cannot withhold action on a bill to prevent Congress from overriding his objections to it, so the pocket veto guarantees that Congress cannot preclude a Presidential veto.

Constitutional provisions must be interpreted "in light of the evil the Framers had sought to bar." *United States v. Brown*, 381 U.S. 437, 447 (1965). Only one interpretation fully achieves both purposes of the Framers. Both the President's ability to consider bills for ten days and the Congress's ability to enact bills over the President's objections are safeguarded when use of the pocket veto is restricted to adjournments during which reconsideration is "prevented" either because the originating House has failed to arrange for the acceptance of veto messages, or because the Congress has terminated. In either of these circumstances, return is "prevented" and a pocket veto must be used to effect a veto. In any other circumstance, the President's constitutional prerogative is fully protected by use of a return veto, and exercise of a pocket veto would unnecessarily deprive Congress of its constitutional right to reconsider bills and to override the President's veto.

During all non-final adjournments, appointment of an agent to receive Presidential messages guarantees that the President can exercise his veto power by returning bills with his objections.²⁹ Professor Charles Black has persuasively explained the effect that Congress's designation of an agent to accept veto messages has on the President's use of his pocket veto authority:

The "pocket veto" was put into Article I to prevent Congress' frustrating the President's veto power by adjournment. When Congress sets up arrangements

²⁹ There are three types of congressional adjournments. "Intrasection" adjournments are breaks within a session taken at the end of each day, over weekends, and for holidays or election campaigns. "Intersession" adjournments separate the two sessions of each Congress. "Final" adjournments occur every two years at the end of a Congress. In addition to adjourning, Congress takes "recesses." However, the difference between a "recess" and an "adjournment" is of only parliamentary, not constitutional, significance. Compare F. Riddick, *Senate Procedure*, S. Doc. No. 2, 97th Cong., 1st Sess. 1 (1981) (adjournment) with *id.* at 869 (recess). A House may choose to adjourn for as little as a few seconds or to recess for months.

which eliminate that effect of adjournment, there is no reason why the "pocket veto" should continue to have force; indeed, it no longer has any warrant in the literal text, if one reads that text freshly. The text does not say, or necessarily imply, that adjournment will always "prevent" return; it provides only for the case where it does.

Black, *Some Thoughts on the Veto*, 40 Law & Contemp. Probs., spring 1976, at 87, 101 (emphasis omitted). An intersession adjournment during which the Houses have arranged for the receipt of Presidential messages, as is involved here, neither frustrates the President's veto power nor forecloses Congress's right to override. All pending legislative business carries over from the first session.³⁰ Congress may reconsider in its second session a bill that the President vetoed during its first session.³¹ Similarly,

³⁰ See Standing Rules of the Senate, S. Doc. No. 13, 99th Cong., 1st Sess. 13 (1985) (Rule XVIII) ("At the second or any subsequent session of a Congress the legislative business of the Senate which remained undetermined at the close of the next preceding session of that Congress shall be resumed and proceeded with in the same manner as if no adjournment of the Senate had taken place."); Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 277, 98th Cong., 2d Sess., § 901, at 630 (1985) (House Rule XXVI) ("All business before committees of the House at the end of one session will be resumed at the commencement of the next session of the same Congress in the same manner as if no adjournment had taken place.").

³¹ See, e.g., H.R. 1562, 99th Cong. (House sustained during second session President Reagan's veto during first session); Pub. L. No. 94-206, 90 Stat. 3 (1976) (Congress overrode during second session of 94th Congress President Ford's veto of H.R. 8069 during first session); S. 183 and H.R. 6136, 49th Cong. (House sustained during second session President Cleveland's veto during first session); H.R. 392, 33d Cong. (House sustained during second session President Pierce's veto during first session); H.R. 14, 27th Cong. (House sustained during second session President Tyler's veto during first session); see 132 Cong. Rec. H5506 (daily ed. Aug. 6, 1986); 131 Cong. Rec. H12830 (daily ed. Dec. 17, 1985); Senate Library, U.S. Senate, *Presidential Vetoes, 1789-1976*, at 15, 22-23, 64, 78, 459 (1978).

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during its second session Congress may properly consider whether to override a veto exercised during its intersession adjournment—but only if the President has returned the bill with his objections.

The alternative interpretation proffered by petitioners (Pet. Br. 44–45)—that the President be permitted to pocket veto whenever Congress has adjourned for more than three days—in contrast would subvert the Framers' purposes by substantially converting the President's qualified authority to return bills to Congress into the absolute veto power that the Constitutional Convention unanimously rejected. The petitioners' interpretation would transform the pocket veto authority from its intended purpose, as a defensive mechanism to safeguard the President's role, into an offensive device through which the President could regularly deprive Congress of its opportunity to consider whether to override.³² Such a transformation of the terms upon which the Legislative and Executive Branches share the lawmaking authority

A different legislative circumstance is presented only by a final adjournment. A final adjournment is the expression of Congress's determination not to resume legislative business. Return of a bill would be futile, because the new Congress could not override the veto of the previous Congress's bill: all legislative business starts anew. See Kennedy, *Congress, the President and the Pocket Veto*, 63 Va. L. Rev. 355, 381 (1977).

³² The Attorney General noted before the Supreme Court in *Edwards v. United States* the "large number of bills presented to Presidents at the end of sessions of Congress in modern times," and stressed the importance to the "public interest" of adopting a construction of art. I, § 7 that took account of that fact. 286 U.S. at 484. Congress's modern practice is to take a number of adjournments in each session, as well as a limited adjournment between sessions. For example, in the period of President Reagan's tenure Congress has adjourned for more than three days thirty-seven times. See Addendum I, p. 69 *infra*; Addendum II, pp. 71–72 *infra*. Petitioners' interpretation would have permitted the President to pocket veto, and thus to negate absolutely with no opportunity for Congress to override, all of the bills that Congress enacted shortly before these adjournments. See Brief for the Speaker and Bipartisan Leadership Group of the United States House of Representatives, Addenda I and II.

under the Constitution is irreconcilable with the Framers' intent.³³

The sole constitutional value that petitioners invoke to support their view that Congress's adjournment necessarily prevented the President from returning H.R. 4042 is their observation that the President's disapproval of a bill "was to be regarded as a momentous occasion of disagreement between the political Branches." Pet. Br. 37. From this unobjectionable fact, the petitioners infer that "[t]o accord significance to the presence of an agent [of Congress] would trivialize the formal return of a bill by the President." *Id.* at 39. They do not explain, however, why return of vetoes to a congressional agent "trivializes" the veto process while the return by a Presidential agent does not.³⁴ Nor do petitioners explain why use of a congressional agent "trivializes" the veto process while the use of agents by both Congress and the President does not equally "trivialize" the process by which bills are "pre-

³³ As the court of appeals cogently stated, petitioners' three-day adjournment rule would "frustrate the goal of protecting Congress's right to overrule presidential disapproval without furthering the goal of protecting the President's opportunity to disapprove of legislation." Pet. App. 45a. The court soundly rejected petitioners' argument that "the three-day limit imposed by Article I, Section 5, Clause 4 on the length of an adjournment that can be taken without the concurrence of both Houses . . . should also be regarded as the constitutionally specified dividing line between those adjournments that 'prevent' the President from returning a bill for immediate reconsideration by Congress and those brief recesses that do not unacceptably postpone such reconsideration." Pet. Br. 44. The court concluded that "there is strong reason to believe that the Framers intended no such connection whatsoever," Pet. App. 43a–44a, "between the pocket veto clause and the clause governing adjournment by one house," *id.* at 43a, and that petitioners' "choice of three days as a bright line thus appears to have no textual grounding at all," *id.* at 44a. See pp. 48–49 *infra*.

³⁴ See J.A. 65 (Declaration of petitioner Ronald R. Geisler, Executive Clerk of White House) ("It is part of my duties to physically deliver a veto message from the President. . .").

sented to the President of the United States." U.S. Const., art. I, sec. 7, cl. 2.³⁵

The carefully balanced provisions of Article I, section 7 that culminate in "Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power" *Chadha*, 462 U.S. at 957. "To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded." *Id.* at 957-58. The irony of petitioners' position is that, out of regard for the "momentousness" of disagreements between the Congress and the President over legislation, they propose discarding the Framers' carefully designed prescription for resolving such disagreements—the power of Congress to override the President on two-thirds' vote. The Executive's attempt to deviate from the legislative scheme established in Article I reflects "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power" and "must be resisted." *Id.* at 951.

B. The Adjournment of the First Session of the Ninety-Eighth Congress Did Not Prevent the President From Returning H.R. 4042 With His Objections

The Court's previous adjudications of the pocket veto provision establish that, because "Congress by their Adjournment" between sessions of the Ninety-Eighth Congress did not "prevent [H.R. 4042's] Return" to the House of Representatives, "the Same shall be a Law, in like Manner as if [the President] had signed it." U.S. Const.,

³⁵ *Accord Wright*, 302 U.S. at 590:

There is no greater difficulty in returning a bill to one of the two Houses when it is in recess during the session of Congress than in presenting a bill to the President by sending it to the White House in his temporary absence. Such a presentation is familiar practice. The bill is sent by a messenger and is received by the President. It is returned by a messenger, and why may it not be received by the accredited agent of the legislative body?

art. I, sec. 7, cl. 2. The Court established in the *Pocket Veto Case*, 279 U.S. 655, 680 (1929), that "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill" Because the House of Representatives had appointed an agent to accept messages from the President during its adjournment, Congress did not prevent the President from returning H.R. 4042 to the House.

1. The Court Has Established That the President May Constitutionally Return Bills to Congress During Adjournments Through Delivery to Agents

In its first resolution of a pocket veto question, the *Pocket Veto Case*, the Court sustained President Coolidge's pocket veto of a Senate bill during the five-month intersession adjournment of the Sixty-Ninth Congress, rejecting the argument of beneficiaries of the bill that the pocket veto had been ineffective. *Ibid.* The Court first observed that neither House had provided authorization for an agent to receive vetoed bills from the President during an adjournment and then added in *dictum* that "the delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate."³⁶ Because there was no practice of accepting Presidential messages during an adjournment, the Court concluded that return to an agent could engender disputes over the date of delivery of a bill and public

³⁶ *Id.* at 684. The Department of Justice has shared the understanding that this portion of the Court's opinion was *dictum*. See *Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 18 (1971)* (testimony of then-Assistant Attorney General Rehnquist); Brief for the Appellants 30 n.21, *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

uncertainty about a bill's status.³⁷ The Court found that delivery to a House in session would remove those concerns.³⁸

Nine years later in *Wright v. United States*, 302 U.S. 583 (1938), the Court ruled that delivery to a House in session is not the only solution to these problems. At issue there was President Roosevelt's return veto of a Senate bill while the Senate was in a three-day recess, but the House of Representatives was sitting. The Secretary of the Senate had accepted the veto message and had presented it to the Senate when it reconvened. The Court rejected the plaintiff's claim, based squarely on the Court's earlier opinion in the *Pocket Veto Case*, that the President's return veto had been invalid. The Court held, "In returning the bill to the Senate by delivery to its Secretary during the recess there was no violation of any express requirement of the Constitution. The Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return." *Id.* at 589. The Court noted that its contrary statement in the *Pocket Veto Case* that the Constitution forbade return of a bill to an officer during an adjourn-

³⁷ The Court explained that as of 1929, "Congress has never enacted any statute authorizing any officer or agent of either House to receive for it bills returned by the President during its adjournment, and . . . there is no rule to that effect in either House. . . ." 279 U.S. at 684.

³⁸

[I]t was plainly the object of the constitutional provision that there should be a timely return of the bill, which should not only be a matter of official record definitely shown by the journal of the House itself, giving public, certain and prompt knowledge as to the status of the bill, but should enable Congress to proceed immediately with its reconsideration; and that the return of the bill should be an actual and public return to the House itself, and not a fictitious return by a delivery of the bill to some individual which could be given a retroactive effect at a later date when the time for the return of the bill to the House had expired.

Id. at 684-85.

ment was *dictum* and did not control its judgment. *Id.* at 593-94.³⁹

The Court based its holding in *Wright* that return of the bill through delivery to a Senate officer during a recess constituted an effective veto on its observation that there was no "practical difficulty in making the return of the bill during the recess. The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive, the bill." *Id.* at 589-90. The Court examined the dangers of "no certain knowledge" over the bill's legal status and "undue delay" in its reconsideration, which had motivated the Court's decision in the *Pocket Veto Case*, and concluded, based upon "the manifest realities" of the brief recess at issue, that the dangers were "wholly chimerical." *Id.* at 595. Thus, the Court established in *Wright* that, contrary to its earlier statement in the *Pocket Veto Case*, the use of congressional agents to receive veto messages from the President during an adjournment is not flatly prohibited by the Constitution. Instead, whether the President is constitutionally able to return a bill to Congress through delivery to an appointed congressional agent depends upon whether the potential dangers of un-

³⁹ Petitioners maintain unconvincingly that in *Wright* "[t]he Court was careful, however, not to disturb the rule of the *Pocket Veto Case*." Pet. Br. 43. The extent of the Court's limitation in *Wright* of its dictum in the *Pocket Veto Case* is evident from its reliance in *Wright* on the brief that Representative Sumners had filed nine years earlier in the *Pocket Veto Case*. The House Judiciary Committee did not appear in *Wright* as it had in the *Pocket Veto Case*, but the Court in retrospect found so much merit in Representative Sumners' argument that it took the unusual step of summoning up and reciting at length his clear statement of the "practical considerations" that govern the presentment and return of bills. See *Wright*, 302 U.S. at 590-92. Those considerations included the observations that the Constitution did not forbid the use of agents, that the President regularly used agents to receive bills, and that the imposition of a formal requirement of personal receipt by Congress and the President would cause unnecessary delays and complications. *Ibid.*

certainty and delay arising from such a return veto are "real" or "illusory." *Ibid.*⁴⁰

Petitioners offer a strikingly different reading of the *Pocket Veto Case* and *Wright*. They note that the adjournment at issue in the *Pocket Veto Case* occurred between sessions of the Sixty-Ninth Congress, while in *Wright* the originating House was recessed for three days. Pet. Br. 39-42. Petitioners deduce from these two facts that the sole distinction that underlay the Court's determinations that a pocket veto was appropriate in the *Pocket Veto Case* while a return veto was suitable in *Wright* was the fact that the former veto occurred during an adjournment of the Congress, while the latter occurred while only the originating House was in recess. *Id.* at 42-43. Thus, petitioners argue that because H.R. 4042 was pocket vetoed during an intersession adjournment, the result in the *Pocket Veto Case* is "controlling here and require[s] reversal of the judgment below." *Id.* at 39.

Although the Court in *Wright* noted the difference between the two types of adjournments, 302 U.S. at 587-89, it did not rest its decision solely on that difference, but instead followed its admonition in that *Pocket Veto Case* that the type of adjournment does not resolve whether return was "prevented." The Court therefore proceeded to examine the concerns that had underlain its *Pocket Veto* decision and found them "inapposite to the circumstances of this case," *id.* at 593, because "[w]hen there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may

⁴⁰ In 1974 in *Kennedy v. Sampson*, the D.C. Circuit applied this "exception—or, at least, . . . a logical extension of the exception—to the *Pocket Veto Case* established in *Wright*," 511 F.2d at 440, to conclude that modern intrasession adjournments of Congress do not prevent the return of bills through delivery to designated congressional agents. The Executive chose not to petition for certiorari in that case and has been using return vetoes during intrasession adjournments ever since. See pp. 59-61 *infra*.

be reconsidered immediately after the short recess is over," *id.* at 595.

Moreover, the Court's decision in *Wright* expressly forecloses the constitutional interpretation that petitioners proffer. Petitioners contend that the requirement of Article I, section 5, clause 4, that each House obtain the permission of the other House to adjourn for more than three days "should also be regarded as the constitutionally specified dividing line between those adjournments that 'prevent' the President from returning a bill for immediate reconsideration by Congress and those brief recesses that do not unacceptably postpone such reconsideration." Pet. Br. 44. This rule would permit use of the pocket veto when one House was adjourned for more than three days, but the other House was sitting. However, in *Wright* the Court held precisely that an adjournment of one House is *not* an adjournment of the Congress within the meaning of the pocket veto provision. 302 U.S. at 587-88. The contrary holding would irrationally render the President "prevented" from returning a bill to the originating House even when it is in session, merely because the other House is adjourned for more than three days.⁴¹ The three-day rule of Article I, section 5, clause 4 provides no useful guidance on the scope of the pocket veto power.

Contrary to the petitioners' formalistic view, the *Pocket Veto Case* and *Wright*, read together, require the application of two guiding principles. First, "under the constitutional provision the determinative question" is not what type of adjournment occurred, but whether the adjournment "is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed." 279 U.S. at 680. Second, to answer that inquiry it is necessary to conduct a realistic appraisal

⁴¹ See *Kennedy v. Sampson*, 511 F.2d at 440 ("[I]t is difficult to see how the presence or absence of the non-originating House at the time of the return could affect our decision.").

whether use of a return veto would generate constitutionally unacceptable uncertainty or delay.⁴²

2. *The President's Return of Bills to Congressional Agents During Modern Adjournments Creates No Constitutional Difficulties*

The "manifest realities" (*Wright*, 302 U.S. at 595) of Congress's modern adjournment practices reveal that, as long as the originating House has authorized an agent to accept veto messages, no serious risk remains of either public uncertainty over the status of a bill vetoed during an intersession adjournment or undue delay in reconsidering it when Congress convenes its second session. The Court's concern in the *Pocket Veto Case* about the uncertain status of a bill returned to Congress during an adjournment resulted from the lack at that time of a tradition of receipt of Presidential messages by congressional agents. 279 U.S. at 683-84. The Court feared that return

⁴² The Court expressly disclaimed reliance in the *Pocket Veto Case* on the category of adjournment and focused instead on whether the adjournment, whatever its type, was one that prevented use of the return veto. The Court has never established a *per se* rule holding that all intersession adjournments necessarily prevent the return of bills. The fact that in *Wright* the Court was not establishing a constitutional distinction for pocket veto purposes between congressional adjournments and one-House recesses is evident from the Court's express reservation of cases that "may arise in which . . . a long period of adjournment may result. We have no such case before us and we are not called upon to conjecture as to the nature of the action which might be taken by the Congress in such a case or what would be its effect." 302 U.S. at 598. Thus, as the court of appeals recognized, "the Court expressly left open the possibility that its analysis would apply to render return to an agent effective in adjournments other than brief, one-house, intrasession adjournments." Pet. App. 29a.

In *Kennedy v. Sampson* the Executive proffered the identical factual distinction between the *Pocket Veto Case* and *Wright* to support the President's use of a pocket veto during a five-day intrasession adjournment of the Congress. See 511 F.2d at 439. The court rejected the Executive's reliance on the difference between a three-day adjournment of one House and a five-day adjournment of both Houses, because "[t]hese distinctions fail to overcome the logic and reasoning of the *Wright* decision." *Ibid*.

to an "agent not authorized to make any legislative record of its delivery . . . [would] leav[e] open possible questions as to the date on which it had been delivered to him, or whether it had in fact been delivered to him at all." *Id.* at 684.

Because both Houses now formally direct agents to accept veto messages, contemporary practices have rendered the Court's concern "illusory." *Wright*, 302 U.S. at 595. During all contemporary intrasession and intersession adjournments and recesses, just as in the recess in *Wright*, "the organization of the House and its appropriate officers continue to function without interruption." *Ibid*. Continuation of the institutional functions of the Houses ensures a clear and certain public record of any messages received from the President, whether the Houses at the time are in a three-day recess or a nine-week intersession adjournment.⁴³ The nature of an adjournment does not affect the public recording of a Presidential veto, and return of bills to a congressional agent has never occasioned a dispute about the date, or fact, of their delivery.

Moreover, "uncertainty" is no longer a significant concern, regardless of Congress's formal recordkeeping practices. In recent years the President has made public announcements, often including messages to Congress and releases to the press, of both his return vetoes and his pocket vetoes. The statements accompanying both types of vetoes are printed contemporaneously in the Weekly Compilation of Presidential Documents and appear subse-

⁴³ The date and exact time of receipt of veto messages of House bills is recorded by the Clerk of the House of Representatives, when he receives the veto message from petitioner Geisler or his subordinate. The bill is then sent with a letter of transmittal to the Speaker, noting the time and date of receipt. See, e.g., 132 Cong. Rec. H2 (daily ed. Jan. 21, 1986) (communication from Clerk of House) (noting that the Clerk had received veto messages from the President "[a]t 3:45 p.m. on Tuesday, January 14, 1986," and "[a]t 3:15 p.m. on Friday, January 17, 1986," during Congress's intersession adjournment).

quently in the Public Papers of the Presidents.⁴⁴ As the D.C. Circuit concluded in *Kennedy v. Sampson*, "Modern methods of communication make it possible for the return of a disapproved bill to an appropriate officer of the originating House to be accomplished as a matter of public record accessible to every citizen." 511 F.2d at 441.⁴⁵ Whatever circumstances prevailed in 1929, uncertainty about the status of a bill returned to Congress during an intersession adjournment is no longer a serious concern.⁴⁶

⁴⁴ The veto of H.R. 4042 was (1) publicly announced by the President's press spokesman, J.A. 35-36; (2) reported in the press, see, e.g., N.Y. Times, Dec. 1, 1983, at A1; (3) reprinted in the Presidential documentary record, 19 Weekly Comp. Pres. Doc. 1627 (Nov. 30, 1983); 1983-2 Pub. Papers 1636; and (4) noted in the Congressional Record, 129 Cong. Rec. D1604 (daily ed. Dec. 14, 1983).

⁴⁵ The court continued in *Sampson*,

The status of such a bill would be clear; it has failed to receive presidential approval but may yet become law if Congress, upon resumption of its deliberations, passes the bill again by a two-thirds majority. This state of affairs generates no more public uncertainty than does the return of a disapproved bill while Congress is in actual session.

Ibid. (footnote omitted).

⁴⁶ Petitioners buttress their "uncertainty" argument by citing a document, apparently modeled after the New York Constitution, which was drafted for the use of the Committee on Detail at the Constitutional Convention. The draft contained much of the language of art. I, § 7, cl. 2, but provided that, if the President failed to sign a bill within the allotted period, and Congress's adjournment prevented the bill's return, the President could veto the bill by returning it when the originating House was next in session. See 2 Farrand at 160-62. Petitioners analogize this proposal to use of a return veto during a congressional adjournment and infer that "the most plausible explanation [for the draft's replacement with the pocket veto provision] clearly is that the Drafters were unwilling to permit the status of an unsigned bill to remain uncertain until such time as Congress might reconvene." Pet. Br. 36.

Petitioners' reliance on this document is misplaced for two reasons. First, we know of no evidence, and petitioners have offered none, about the role of the document in the Framers' deliberations. The rejection of the draft may have been the work of only two participants,

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Delay in Congress's reconsideration of a vetoed bill is never a sufficient ground alone to justify the President's use of a pocket veto instead of a return veto, because the potential for delay is not constitutionally relevant to the

James Wilson and John Rutledge (see 2 Farrand at 152 n.14, 159 n.16, 163 n.17, 167), and the draft's author, Wilson, was one of the only three Framers who favored an absolute Presidential veto, see 1 Farrand at 108. It is not apparent whether any other member of the Committee on Detail, let alone of the Convention, ever saw this document or made any judgments about it.

Second, even if it had been a focus of the Framers' deliberations, this document would not be probative because, as petitioners candidly acknowledge (Pet. Br. at 36), there is no evidence supporting their explanation for the change over other equally plausible explanations. The court of appeals noted evidence suggesting that the Framers anticipated that Congress's adjournments between sessions would last for most of the year and that Congress would not carry over its unfinished business at its second session. Pet. App. 40a; see H.R. Doc. No. 277, *supra* n.30, § 901, at 630-31 (until 1818 each House began unfinished business anew in second session). That the refinement resulted from the Framers' expectation that Congress's schedule would render a return veto pointless is as likely as petitioners' supposition that they "were unwilling to permit the status of an unsigned bill to remain uncertain." Pet. Br. 36. In either event,

the adjournment practices of Congress as envisioned by members of the Committee bear no resemblance to the actual adjournment practices of the modern-day Congress, and to accord determinative weight to the Committee's supposed views on whether intersession adjournments prevented return would therefore seriously disserve the larger purpose of the pocket veto clause as understood by the Supreme Court. Given that under the principles of *Wright* and the *Pocket Veto Case*, intersession adjournments no longer pose the least obstacle to the President's exercise of his qualified veto, it cannot be dispositive that the Committee of Detail may have believed they would.

Pet. App. 40a-41a (footnote omitted).

Because of the existence of equally plausible explanations for the change, and the absence of any contemporaneous explanation or rationale, petitioners' attempt to extract legislative intent from this document fails. As the Court concluded in the *Pocket Veto Case*, with the same evidence before it, "[n]o light is thrown on the meaning of the constitutional provision in the proceedings and debates of the Constitutional Convention. . . ." 279 U.S. at 675.

exercise of the President's veto power. The Court's observation in the *Pocket Veto Case* that allowing the President to return a bill to Congress during an adjournment would "keep[] the bill in the meantime in a state of suspended animation until the House resumes its sittings . . . necessarily causing delay in [the bill's] reconsideration," 279 U.S. at 684, was unnecessary to the Court's resolution of the case and is not controlling.

As the D.C. Circuit pointed out in *Kennedy v. Sampson*, "The Constitution itself sets no time limit upon Congress' right to override a presidential veto." 511 F.2d at 440 n.27. The Constitution sets a time limit on the President's action, so that he cannot indefinitely impede a law's enactment. No such restraint is necessary on the Congress, whose interest is in attempting to override the President's veto. Accordingly, although the Constitution provides that the originating House "shall enter the [President's] Objections at large on their Journal, and proceed to reconsider [the vetoed bill]," art. I, sec. 7, cl. 2, it does not limit the interval that may elapse between the date of the President's veto and the date of Congress's vote whether to override. For example, the House of Representatives recently considered whether to override President Reagan's veto of a textile-import relief bill more than seven and one-half months after the veto had been exercised.⁴⁷ This "delay" is longer than every intersession or intrasession adjournment in the history of the Congress, with the exception of one intersession adjournment in 1869.⁴⁸ Unless the Executive takes the position

⁴⁷ See 132 Cong. Rec. H5506-42 (daily ed. Aug. 6, 1986) (override vote); 131 Cong. Rec. H12830 (daily ed. Dec. 17, 1985) (bill returned). The House had postponed consideration of the President's objections in order to attempt "to work out an accommodation which will avoid unnecessary confrontation." *Ibid.* The House sustained the President's veto by voting to override 276-149. See 132 Cong. Rec. H5541-42 (daily ed. Aug. 6, 1986).

⁴⁸ Between sessions of the Forty-First Congress, Congress adjourned for almost eight months. See Addendum I, p. 68 *infra*.

that, by postponing consideration of the veto, Congress lost the constitutional power to override the President's veto, the Executive must concede that delay is not a relevant constitutional concern.⁴⁹

The irrelevance of the concern over delay is further evident from the fact that the Constitution does not require that the originating House *ever* vote on whether to override a veto. The House may fulfill its constitutional obligation to "proceed to reconsider" a vetoed bill in any number of ways, including "laying it on the table, referring it to a committee, postponing reconsideration to a day certain, or immediately voting on reconsideration."⁵⁰ Therefore, under the constitutional scheme established by the Framers, the time lag between a Presidential veto and congressional reconsideration is an irrelevant concern, and the risk of delay before Congress votes on overriding a veto does not affect the President's constitutional ability to return a bill to Congress.⁵¹

⁴⁹ Congress has overridden in its second session bills vetoed during its first session. For example, on January 28, 1976, during the second session of the Ninety-Fourth Congress, Congress overrode the President's veto of H.R. 8069, which the President had vetoed on December 19, 1975, the last day of the Congress's first session. See n.31 *supra*. This veto and override are unquestionably valid, yet the petitioners' position would suggest that if the veto had occurred one day later, thereby *decreasing* the interval before Congress's reconsideration, the "delay" would have been unacceptable and would have required use of a pocket veto. Because Congress may during its second session override a veto that the President exercised during its first session, no objection may be raised on grounds of delay to the inherently more timely consideration during Congress's second session of a veto message received during its intersession adjournment.

⁵⁰ 7 *Cannon's Precedents of the House of Representatives*, § 1105, at 180-81 (1936); see *id.*, §§ 1100-1114, at 177-86; see, e.g., 132 Cong. Rec. H2 (daily ed. Jan. 21, 1986) (referring to committee); *id.*, H3-4 (debating whether to vote immediately, to postpone consideration until specified date, or to refer to committee); 128 Cong. Rec. S13622 (daily ed. Nov. 30, 1982) (indefinitely postponing consideration).

⁵¹ It is ironic that, in the professed interest of promptness, petitioners maintain that the President was free to deprive Congress of the

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Even if the interval between the President's exercise of a veto and Congress's reconsideration were a valid constitutional concern, changes in Congress's schedule since the time of the *Pocket Veto Case* have substantially alleviated the source of the Court's concern over potential delay. The adjournment at issue in the *Pocket Veto Case* lasted five months. 279 U.S. at 672. "At the time of that decision, intersession adjournments of five or six months were still common." *Sampson*, 511 F.2d at 441; see *id.* at 441 n.30. In contrast, contemporary adjournments are far shorter than they were in the years preceding *Pocket Veto*, and because "matters of legislative concern [are] constantly proliferating," in the modern era "Congress [is] almost constantly in session." *Gravel v. United States*, 408 U.S. 606, 616 (1972).⁵² In the past twenty-five years,

opportunity to override his veto, thereby encouraging Congress to withhold the presentation of enacted bills or requiring it to begin the legislative process anew, either of which would generate considerably more delay.

⁵² Accord Mansfield, *The Dispersion of Authority in Congress*, 32 Proc. Acad. Pol. Sci. 1, 6 (1975) ("[A]part from [these] short recesses . . . Congress has been in virtually continuous session since January 1939. . . ."). The modern abbreviation of intersession adjournments is largely the result of the enactment of the Twentieth Amendment in 1933, four years after the *Pocket Veto Case*. Prior to then, each Congress lasted from March 4 of the odd-numbered year to March 3 of the next odd-numbered year, but, pursuant to art. I, § 4, cl. 2, each session began in December. The intersession adjournment typically lasted from spring or summer, when the first session adjourned, until December, when the second session convened. See Pet. App. 33a n.26. Since the Twentieth Amendment, each session begins eleven months earlier—in January—and tends to adjourn in the autumn, creating a much shorter intersession adjournment.

Moreover, the modern Congress continues to function during its adjournments. The Houses continue to exchange messages and have bills enrolled, signed, and presented to the President. See H.R. Doc. No. 277, *supra* n.30, § 560, at 270; *id.*, §§ 574–577, at 275–77; see, e.g., 131 Cong. Rec. S363 (daily ed. Part II, Jan. 3, 1985); 129 Cong. Rec. S17192–93 (daily ed. Nov. 18, 1983); 127 Cong. Rec. 32115 (1981). Further, congressional committees, "which, in the legislative scheme of things, [are] for all practical purposes Congress itself," *Doe v. McMillan*, 412 U.S. 306,

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the adjournment between Congress's two sessions has averaged thirty-nine days in length.⁵³ Although, at nine weeks, the adjournment during which the President attempted to pocket veto H.R. 4042 was "somewhat longer than the average," it was "still considerably shorter than the half-year-long adjournments common at the time of the *Pocket Veto Case*."⁵⁴ Thus, as the court of appeals concluded, contemporary intersession adjournments "do not differ in any practical respect from the intrasession adjournments at issue in *Wright* and *Kennedy v. Sampson*." Pet. App. 33a.⁵⁵

344 (1973) (Rehnquist, J., concurring and dissenting), continue to conduct business. See S. Doc. No. 13, *supra* n.30, at 31; H.R. Doc. No. 277, *supra* n.30, § 589, at 282. Similarly, "[t]he business of conferences between the two Houses is not interrupted by an adjournment of a session which does not terminate the Congress. . . ." *Id.*, § 901, at 631.

⁵³ See Addendum I, p. 69 *infra*. The Congress has adjourned for five months or more only twice in the past fifty years, in 1953 and 1955. *Ibid.*

⁵⁴ Pet. App. 33a. At sixty-five days, the adjournment between sessions of the Ninety-Eighth Congress was the longest adjournment in the past twenty years. See Addendum I, p. 69 *infra*.

⁵⁵ *Sampson* involved a five-day intrasession adjournment of Congress. After examining Congress's historical adjournment pattern, the court concluded that "intrasession adjournments of Congress have virtually never occasioned interruptions of the magnitude considered in the *Pocket Veto Case*." 511 F.2d at 441; see *id.* at 442–45 (Appendix). Accordingly, the court concluded that no "intrasession adjournment, as that practice is presently understood, can prevent the return of a bill by the President where appropriate arrangements have been made for receipt of presidential messages during the adjournment." *Id.* at 442. Examination of Congress's pattern of intrasession and intersession adjournments since the *Sampson* case reveals that the factual predicate for the court's conclusion remains equally valid today for adjournments of both types. See Addendum I, p. 69 *infra*; Addendum II, pp. 71–72 *infra*. The court of appeals correctly held that "the distinction between modern intrasession and intersession adjournments" is not "worthy of constitutional significance." Pet. App. 45a.

3. *The House Had Arranged for Its Clerk to Receive Veto Messages During the Intersession Adjournment*

At the conclusion of the first session of the Ninety-Eighth Congress, both Houses of Congress had made "appropriate arrangements . . . for the receipt of presidential messages during the adjournment." *Sampson*, 511 F.2d at 437. The House of Representatives, which originated H.R. 4042, provides by rule for the receipt of Presidential veto messages during all recesses and adjournments: "The Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session."⁵⁶ Both Houses' practice in recent years of explicitly conferring authority upon their officers to receive Presidential messages during adjournments contrasts sharply with the situation prevailing in 1929, when the Court observed that both Houses of Congress had a "long established practice" of receiving messages from the President only while they were in session. *The Pocket Veto Case*, 279 U.S. at 683.⁵⁷ Thus, unlike the situation prevailing in 1929, the contemporary designation of congressional agents to receive veto messages ensured that the President was not prevented from returning H.R. 4042 to the House of Representatives with his objections.

⁵⁶ J.A. 34 (Rule III.5). Because House Rule III applies "at any time that the House is not in session," it provides the Clerk with identical authority to accept veto messages during overnight or other brief breaks and during longer adjournments. Because H.R. 4042 originated in the House, only the House's arrangement to receive Presidential messages when not in session is directly relevant to this case. However, the Senate also had authorized receipt of messages from the President by an officer, its Secretary, during the intersession adjournment. 129 Cong. Rec. S17192-93 (daily ed. Nov. 18, 1983).

⁵⁷ Moreover, Congress's explicit designation of agents to receive veto messages is certainly less open to question than is the practice, which the Court approved in *Wright*, of acceptance of a veto message "to protect the interests of the Senate, so that it might have the opportunity to reconsider the bills" (302 U.S. at 585 n.1), by an officer of the Senate upon whom, at the time of *Wright*, no "such authority ha[d] ever been conferred," *id.* at 599 (opinion of Stone, J.).

C. Recent Presidential and Congressional Practice Demonstrates that the President Could Have Returned H.R. 4042 to Congress

The President could have properly effected a pocket veto of H.R. 4042 only if he had been *prevented* from returning the bill to the House of Representatives with his objections. As then-Assistant Attorney General Rehnquist observed, the President never has a choice as to whether to return a bill to Congress or to use a pocket veto: to preclude a bill from becoming law, the President must return it to the originating House of Congress, unless Congress's adjournment prevents him from doing so.⁵⁸ Recent congressional and Presidential practice, including successful return vetoes during precisely the circumstances involved here, undermines any claim that return of bills during intersession adjournments is impossible. This recent practice conclusively establishes that President Reagan's decision to use a pocket veto to foreclose congressional reconsideration of H.R. 4042 was not necessitated by prevention of a return veto, but was instead a choice that he could not make.

1. *Recent Presidents Have Returned Bills to Congress By Delivery to Congressional Agents*

All Presidents since the D.C. Circuit's decision in *Kennedy v. Sampson* have returned bills to Congress with their objections during various types of congressional ad-

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I do not think that . . . the Constitution . . . contemplates giving [the President] an option saying you can either pocket veto in a situation or you can send it back with a veto message. . . . [T]he President, based on whatever advice he can get, has to determine, "Is this a pocket veto situation or is it a regular veto situation?" and it is either one or the other. . . . [H]e does not have a choice in a sense of saying, "Would I rather pocket veto or would I rather give it a regular veto?" It is either a situation for one or for the other, in my opinion.

Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. 14, 15-16 (1971); accord id. at 19.

journments. Attorney General Levi's announcement of President Ford's policy acknowledged that neither intrasession nor intersession adjournments prevent use of a return veto:

President Ford has determined that he will use the return veto rather than the pocket veto during intra-session and inter-session recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.⁵⁹

Subsequent Presidential practices demonstrate the correctness of this view. Twice President Ford successfully exercised return vetoes by returning bills to Congress during intersession adjournments.⁶⁰ President Carter similarly returned S. 2096, 96th Congress, to the Senate after it had adjourned its first session by delivering the

⁵⁹ 122 Cong. Rec. 11202 (1976). President Ford's agreement followed the entry of a consent judgment in *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976), extending the holding of *Kennedy v. Sampson* to an intersession veto. The judgment declared that a bill purportedly pocket vetoed during the intersession adjournment of the Ninety-Third Congress had become law. This judgment, which the Executive agreed to, and the ruling in *Kennedy v. Sampson*, which the Executive did not appeal, constitute strong evidence that the Executive understands that return to an agent is possible during both intersession and intrasession adjournments.

⁶⁰ During the thirty-day intersession adjournment of the Ninety-Fourth Congress, President Ford vetoed S. 2350 and H.R. 5900, which had been passed during the first session. *House Calendar*, 94th Cong. 130-31 (final ed. 1977). The vetoed bills were accepted by the appointed officers of the respective Houses and noted in the respective journals, and upon the convening of Congress's second session, the messages were laid before the Houses. *Senate Journal*, 94th Cong., 1st Sess. 1431 (1975); *House Journal*, 94th Cong., 1st Sess. 2246-47 (1975); 122 Cong. Rec. 2, 145 (1976). Both vetoes were sustained. *House Calendar*, 94th Cong. 130-31 (final ed. 1977).

vetoed bill to the Secretary of the Senate.⁶¹ President Reagan's veto practices similarly reveal that there is no longer any difficulty in returning a veto when the originating House is not in session. In fact, during President Reagan's tenure, formal return of bills in the presence of the sitting House has been the exception, not the rule. Of the twenty-six bills that President Reagan has return vetoed, only six were returned to the originating House while it was in session.⁶² The other twenty veto messages were returned to an official of the originating House, because the House was not in session when the President vetoed the bill. Ten of these veto messages were delivered to the designated official while the Congress was in intrasession adjournments of between five and fifty-eight days' duration.⁶³ Petitioners' position would render ineffective the return for congressional reconsideration of all ten of these bills.⁶⁴

⁶¹ 126 Cong. Rec. 6-7 (1980). In contrast to President Ford's vetoes, which occurred while the Congress was in intersession adjournment, when President Carter vetoed S. 2096, only the Senate had adjourned; the House of Representatives took no intersession adjournment during the Ninety-Sixth Congress. Petitioners' position would nevertheless challenge the efficacy of President Carter's return veto, because the Senate had adjourned for more than three days.

⁶² See Addendum III, pp. 73-76 *infra*. President Reagan has also pocket vetoed twenty-one bills: two intersession vetoes (including H.R. 4042) and nineteen uncontested pocket vetoes after the final adjournments of the Ninety-Seventh and Ninety-Eighth Congresses. See Addendum III, pp. 73-75 *infra*.

⁶³ See Addendum III, pp. 73-74, 76 *infra*.

⁶⁴ Two of these intrasession return vetoes were overridden by Congress, and the Executive Branch has published those bills as laws. Pub. L. No. 97-215, 96 Stat. 178 (1982) (H.R. 6198); Pub. L. No. 97-257, 96 Stat. 818 (1982) (H.R. 6863). Under petitioners' interpretation these bills were properly subject to a pocket veto, not a return veto. If petitioners are correct, the bills were not subject to congressional reconsideration and override and, hence, they are not laws.

In addition to these intrasession return vetoes, President Reagan returned two bills to Congress during the intersession adjournment of the current Congress, noting the court of appeals' decision in this case,

Continued

Whether the Houses of Congress were adjourned overnight or for two months, the mechanics of Presidential vetoes were executed with routine precision. In each instance, on the first day the originating House was in session, the agent formally transmitted the sealed envelope, which the President had stated contained the vetoed bill together with his objections, to the presiding officer. The date and time of receipt were noted both in the letter of transmittal and in the Congressional Record. The presiding officer announced in the chamber the receipt of the veto message in order for it to be read and to be spread upon the journal.

2. *This Recent Understanding, Rather Than Previous Historical Practices, Illuminates the Current Scope of the Pocket Veto Provision*

Of course, Presidential and congressional practice cannot alter the meaning, or waive the applicability, of the Constitution. See *Chadha*, 462 U.S. at 942 n.13. The question posed by the pocket veto clause, however, is whether Congress has "prevented" the President from returning a bill during a particular adjournment. Where practices and circumstances have changed the answer to that question, the clause contains the flexibility to reflect that change, because "[t]he text does not say, or necessarily imply, that adjournment will always 'prevent' return; it provides only for the case where it does." Black, *supra* p. 41, at 101. Thus, the language of the pocket veto clause itself demonstrates that the clause is not one of those constitutional provisions whose application is fixed by a contemporaneous interpretation by the First Congress. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 411-12

but recording his view that he was entitled to pocket veto these bills. 132 Cong. Rec. H2 (daily ed. Jan. 21, 1986) (H.R. 1404 and H.R. 3384). No difficulties were raised by these returns. President Reagan's eight remaining vetoes were returned to congressional agents while the originating House was adjourned for the weekend or overnight. See Addendum III, pp. 73-75 *infra*.

(1928).⁶⁵ Instead of adopting a fixed definitional approach, the Framers established a conditional rule to guarantee both that the Congress could not deprive the President of his qualified veto and that the President in turn could not deprive the Congress of its right to reconsider vetoed bills. Knowing that they could not accurately predict details of the organizational practices of the government, the Framers left it to events to determine when the condition obtained.⁶⁶

⁶⁵ Petitioners erroneously believe (Pet. Br. 45-47) that the scope of the pocket veto power is controlled by the Court's notation in the *Pocket Veto Case* of "the practical construction that has been given to it by Presidents through a long course of years, in which Congress has acquiesced." 279 U.S. at 688-89. Petitioners' continued reliance on that construction is unconvincing, because, as the court of appeals pointed out, "it developed under adjournment conditions markedly different from those prevailing today." Pet. App. 42a. In recent years the Executive and the Legislative Branches have reached a different understanding that recognizes the ability of congressional agents to accept veto messages during adjournments. It is this construction, which reflects modern realities, that "is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning." *The Pocket Veto Case*, 279 U.S. at 690 (quoting *State v. South Norwalk*, 77 Conn. 257, 264 (1904)).

⁶⁶ Over time, the understanding of other procedural requirements of art. I, sec. 7 has evolved to conform to modern realities and to further the purposes of the provisions. No pocket veto was exercised during the first eleven Congresses. President Madison became the first President to use a pocket veto twenty-three years after the Constitution was ratified by his pocket veto of a bill that had "been presented at an hour too near the end of the session to be returned with objections." 25 Annals of Cong. 17 (1812), reprinted in *Constitutionality of the President's "Pocket Veto" Power: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess.* 132 (1971). In that era Presidential signing practices were far different from today. Presidents signed bills at the Capitol in the belief that they were not empowered to approve bills after Congress had adjourned. Therefore, President Madison had only two days to approve the bill that he pocket vetoed. Since then, the Court has established that the President has the full ten days to decide whether to sign bills, regardless of Congress's schedule. See *Edwards v. United States*, 286

Continued

As the development of cases concerning the pocket veto demonstrates, a return veto that may have been "impossible" (*The Pocket Veto Case*, 279 U.S. at 681) in 1929 need not be impossible for all time.⁶⁷ The modern experience of Presidential and congressional actions demonstrates forcefully that it is now far from "impossible" for the President to return a bill to Congress during an intersession adjournment. Thus, "the determinative question . . . whether . . . an interim adjournment, such as an adjournment of the first session, . . . is one that 'prevents' the President from returning the bill," *id.* at 680, today must be answered negatively.

This Court should reaffirm the principle, which guided its holdings in *Pocket Veto* and *Wright*, that the President

U.S. 482 (1932); *La Abra Silver Mining Co. v. United States*, 175 U.S. 423 (1899). Therefore, pressure can no longer be put on the President for unduly hasty consideration.

Later, initiation of the era of overseas Presidential travel generated the issue of whether delivery of an enrolled bill to the White House constituted presentment, even if the President was out of the country. Observing that "the Constitution is not a code of administrative procedure, but a frame of government," *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624, 629 (Ct. Cl. 1964) (quoting *United States v. Weil*, 29 Ct. Cl. 523, 546 (1894)), *cert. denied*, 380 U.S. 950 (1965), the court permitted delivery to the President's agent, interpreting the presentation directive to give "full play to the overall constitutional mechanism of checks and balance" and rejecting reliance upon past practices and assumptions of both the President and the Congress, *id.* at 630, 631-33.

⁶⁷ The return veto of a bill during the Senate's intersession adjournment in 1980 demonstrates vividly the extent to which circumstances have changed since 1929. See pp. 60-61 & n.61 *supra*. This veto shares several formal attributes with the veto at issue in the *Pocket Veto Case*. In both cases, one House had adjourned *sine die*, while the other House was in an intrasession adjournment before resuming to address remaining business; neither House was in session on the day of return. In the *Pocket Veto Case*, the Court found this to be "in effect" an adjournment of the first session of Congress, and return was prevented. 279 U.S. at 672 n.1. In 1980 return was not prevented, because Congress had appointed agents to accept veto messages, and Presidential practice and judicial judgments had demonstrated that such appointment made return possible.

may use the pocket veto authority only for the purpose for which the Framers provided him with it: to ensure that Congress does not deprive him of the ability to veto a bill. The Court should reject the Executive Branch's contrary view that the President may choose to use the pocket veto, notwithstanding his ability to return a bill to Congress with his objections, in order to preclude Congress from overriding his veto. The principle of separated and mutually checking powers does not tolerate this diminution of the Congress's prerogative to enact legislation over the President's objections.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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September 1986.

**ADDENDUM I: INTERSESSION ADJOURNMENTS OF
CONGRESS, 1789-1986**

Congress/ Session ¹	Dates of adjournment ²	Length of adjournment ³	Number of pocket vetoes
1/1	Sept. 30, 1789-Jan. 4, 1790	3 mos.....	0
1/2	Aug. 13-Dec. 6, 1790.....	3¼ mos.....	0
2/1	May 9-Nov. 5, 1792.....	5¼ mos.....	0
3/1	June 10-Nov. 3, 1794.....	4¼ mos.....	0
4/1	June 2-Dec. 5, 1796	6 mos.....	0
5/1	July 11-Nov. 13, 1797.....	4 mos.....	0
5/2	July 17-Dec. 3, 1798	4½ mos.....	0
6/1	May 15-Nov. 17, 1800.....	6 mos.....	0
7/1	May 4-Dec. 6, 1802	7 mos.....	0
8/1	Mar. 28-Nov. 5, 1804	7¼ mos.....	0
9/1	Apr. 22-Dec. 1, 1806	7¼ mos.....	0
10/1	Apr. 26-Nov. 7, 1808.....	6½ mos.....	0
11/1	June 29-Nov. 27, 1809.....	5 mos.....	0
11/2	May 2-Dec. 3, 1810	7 mos.....	0
12/1	July 7-Nov. 2, 1812.....	3¼ mos.....	1
13/1	Aug. 3-Dec. 6, 1813.....	4 mos.....	0
13/2	Apr. 19-Sept. 19, 1814.....	5 mos.....	0
14/1	May 1-Dec. 2, 1816	7 mos.....	1
15/1	Apr. 21-Nov. 16, 1818.....	6¼ mos.....	0
16/1	May 16-Nov. 13, 1820.....	6 mos.....	0
17/1	May 9-Dec. 2, 1822	6¼ mos.....	0
18/1	May 28-Dec. 6, 1824	6¼ mos.....	0
19/1	May 23-Dec. 4, 1826	6¼ mos.....	0
20/1	May 27-Dec. 1, 1828.....	6¼ mos.....	0
21/1	June 1-Dec. 6, 1830	6¼ mos.....	2
22/1	July 17-Dec. 3, 1832	4½ mos.....	2
23/1	July 1-Dec. 1, 1834	5 mos.....	1
24/1	July 5-Dec. 5, 1836	5 mos.....	0
25/1	Oct. 17-Dec. 4, 1837	48 days.....	0
25/2	July 10-Dec. 3, 1838	4¼ mos.....	0
26/1	July 22-Dec. 7, 1840	4½ mos.....	0
27/1	Sept. 14-Dec. 6, 1841	2¼ mos.....	0
27/2	Sept. 1-Dec. 5, 1842	3¼ mos.....	2
28/1	June 18-Dec. 2, 1844	5½ mos.....	0
29/1	Aug. 11-Dec. 7, 1846.....	3¼ mos.....	0
30/1	Aug. 15-Dec. 4, 1848.....	3½ mos.....	0
31/1	Oct. 1-Dec. 2, 1850	62 days.....	0
32/1	Sept. 1-Dec. 6, 1852.....	3¼ mos.....	0
33/1	Aug. 8-Dec. 4, 1854.....	3¼ mos.....	0
34/1	Aug. 19-Aug. 21, 1856.....	2 days.....	0
34/2	Aug. 31-Dec. 1, 1856.....	3 mos.....	0
35/1	June 15-Dec. 6, 1858	5¼ mos.....	1
36/1	June 26-Dec. 3, 1860	5¼ mos.....	0
37/1	Aug. 7-Dec. 2, 1861.....	3¼ mos.....	0
37/2	July 18-Dec. 1, 1862.....	4½ mos.....	0
38/1	July 5-Dec. 5, 1864	5 mos.....	2
39/1	July 29-Dec. 3, 1866	4¼ mos.....	2

**ADDENDUM I: INTERSESSION ADJOURNMENTS OF
CONGRESS, 1789-1986—Continued**

Congress/ Session ¹	Dates of adjournment ²	Length of adjournment ³	Number of pocket vetoes
40/1	Dec. 2-Dec. 2, 1867	0 days	0
40/2	Nov. 11-Dec. 7, 1868	26 days	0
41/1	Apr. 11-Dec. 6, 1869	7¼ mos	1
41/2	July 16-Dec. 5, 1870	4½ mos	0
42/1	Apr. 21-Dec. 4, 1871	7½ mos	1
42/2	June 11-Dec. 2, 1872	5¼ mos	2
43/1	June 24-Dec. 7, 1874	5½ mos	2
44/1	Aug. 16-Dec. 4, 1876	3½ mos	1
45/1	Dec. 3-Dec. 3, 1877	0 days	0
45/2	June 21-Dec. 2, 1878	5¼ mos	0
46/1	July 2-Dec. 1, 1879	5 mos	0
46/2	June 17-Dec. 6, 1880	5½ mos	0
47/1	Aug. 9-Dec. 4, 1882	3¾ mos	0
48/1	July 8-Dec. 1, 1884	4¾ mos	6
49/1	Aug. 6-Dec. 6, 1886	4 mos	10
50/1	Oct. 21-Dec. 3, 1888	43 days	22
51/1	Oct. 2-Dec. 1, 1890	2 mos	11
52/1	Aug. 6-Dec. 5, 1892	4 mos	1
53/1	Nov. 4-Dec. 4, 1893	30 days	0
53/2	Aug. 29-Dec. 3, 1894	3¼ mos	6
54/1	June 12-Dec. 7, 1896	5¾ mos	16
55/1	July 25-Dec. 6, 1897	4¼ mos	0
55/2	July 9-Dec. 5, 1898	4¾ mos	1
56/1	June 8-Dec. 3, 1900	5¾ mos	2
57/1	July 2-Dec. 1, 1902	5 mos	0
58/1	Dec. 7-Dec. 7, 1903	0 days	0
58/2	Apr. 29-Dec. 5, 1904	6¼ mos	0
59/1	July 1-Dec. 3, 1906	5 mos	9
60/1	May 31-Dec. 7, 1908	7¼ mos	0
61/1	Aug. 6-Dec. 6, 1909	4 mos	0
61/2	June 26-Dec. 5, 1910	5¼ mos	3
62/1	Aug. 23-Dec. 4, 1911	3½ mos	0
62/2	Aug. 27-Dec. 2, 1912	3¼ mos	2
63/1	Dec. 1-Dec. 1, 1913	0 days	0
63/2	Oct. 25-Dec. 7, 1914	43 days	0
64/1	Sept. 9-Dec. 4, 1916	2¾ mos	1
65/1	Oct. 7-Dec. 3, 1917	57 days	1
65/2	Nov. 22-Dec. 2, 1918	10 days	0
66/1	Nov. 20-Dec. 1, 1919	11 days	0
66/2	June 6-Dec. 6, 1920	6 mos	3
67/1	Nov. 24-Dec. 5, 1921	11 days	0
67/2	Sept. 23-Nov. 20, 1922	58 days	1
67/3	Dec. 4-Dec. 4, 1922	0 days	0
68/1	June 8-Dec. 1, 1924	5¾ mos	0
69/1	July 4-Dec. 6, 1926	5 mos	5
70/1	May 30-Dec. 3, 1928	6 mos	3
71/1	Nov. 23-Dec. 2, 1929	9 days	0
71/2	July 4-Dec. 1, 1930	5 mos	3

**ADDENDUM I: INTERSESSION ADJOURNMENTS OF
CONGRESS, 1789-1986—Continued**

Congress/ Session ¹	Dates of adjournment ²	Length of adjournment ³	Number of pocket vetoes
72/1	July 17-Dec. 5, 1932	4½ mos	1
73/1	June 16, 1933-Jan. 3, 1934	6½ mos	1
74/1	Aug. 27, 1935-Jan. 3, 1936	4¼ mos	28
75/1	Aug. 22-Nov. 15, 1937	2¾ mos	23
75/2	Dec. 22, 1937-Jan. 3, 1938	12 days	0
76/1	Aug. 6-Sept. 21, 1939	46 days	40
76/2	Nov. 4, 1939-Jan. 3, 1940	60 days	0
77/1	Jan. 3-Jan. 5, 1942	2 days	0
78/1	Dec. 22, 1943-Jan. 10, 1944	19 days	3
79/1	Dec. 22, 1945-Jan. 14, 1946	23 days	4
80/1	Dec. 20, 1947-Jan. 6, 1948	17 days	0
81/1	Oct. 20, 1949-Jan. 3, 1950	75 days	2
82/1	Oct. 21, 1951-Jan. 8, 1952	79 days	4
83/1	Aug. 4, 1953-Jan. 6, 1954	5 mos	6
84/1	Aug. 3, 1955-Jan. 3, 1956	5 mos	8
85/1	Aug. 31, 1957-Jan. 7, 1958	4¼ mos	9
86/1	Sept. 16, 1959-Jan. 6, 1960	3½ mos	10
87/1	Sept. 28, 1961-Jan. 10, 1962	3¼ mos	2
88/1	Dec. 31, 1963-Jan. 7, 1964	7 days	2
89/1	Oct. 24, 1965-Jan. 10, 1966	2½ mos	0
90/1	Dec. 16, 1967-Jan. 15, 1968	30 days	1
91/1	Dec. 24, 1969-Jan. 19, 1970	26 days	0
92/1	Dec. 18, 1971-Jan. 18, 1972	31 days	1
93/1	Dec. 23, 1973-Jan. 21, 1974	29 days	1 ⁴
94/1	Dec. 20, 1975-Jan. 19, 1976	30 days	0
95/1	Dec. 16, 1977-Jan. 19, 1978	34 days	0
96/1	Jan. 3, 1980-Jan. 3, 1980	0 days	0
97/1	Dec. 17, 1981-Jan. 25, 1982	39 days	1
98/1	Nov. 19, 1983-Jan. 23, 1984	65 days	1 ⁵
99/1	Dec. 21, 1985-Jan. 21, 1986	31 days	0

¹ Congress and session numbers represent the session preceding the adjournment. Sources: U.S. Congress, *1985-1986 Congressional Directory* 420-25 (1985); 131-32 Cong. Rec. (1985-86).

² The date of the beginning of each adjournment is the first day on which neither House of Congress was in session, unless Congress adjourned and reconvened the same day. The date of the end of each adjournment is the day on which one or both Houses reconvened.

³ The length of adjournment is the number of days on which neither House of Congress was in session. The length represents the number of days from the day after the last House adjourned through the day before either House reconvened. These intervals have been rounded to the nearest one-quarter month. Adjournments of less than 2½ months have been expressed exactly in days.

⁴ See *Kennedy v. Jones*, 412 F. Supp. 353 (D.D.C. 1976).

⁵ H.R. 4042, 98th Congress.

**ADDENDUM II: INTRASESSION ADJOURNMENTS OF
CONGRESS,¹ 1974-SEPTEMBER 1986²**

Congress/ Session	Dates of adjournment ³	Length of adjournment ⁴	Number of pocket vetoes
93/2	Aug. 23-Sept. 4, 1974.....	12 days.....	0
	Oct. 18-Nov. 18 1974	31 days.....	
	Nov. 27-Dec. 2, 1974	5 days.....	
94/1	Mar. 27-Apr. 7, 1975.....	11 days.....	0
	May 23-June 2, 1975.....	10 days.....	
	June 28-July 7, 1975.....	9 days.....	
	Aug. 2-Sept. 3, 1975.....	32 days.....	
	Oct. 10-Oct. 20, 1975.....	10 days.....	
	Oct. 24-Oct. 28, 1975.....	4 days.....	
	Nov. 21-Dec. 1, 1975.....	10 days.....	
94/2	Feb. 12-Feb. 16, 1976.....	4 days.....	0
	Apr. 15-Apr. 26, 1976.....	11 days.....	
	May 29-June 1, 1976.....	3 days.....	
	July 3-July 19, 1976.....	16 days.....	
	Aug. 11-Aug. 23, 1976.....	12 days.....	
	Sept. 3-Sept. 7, 1976.....	4 days.....	
95/1	Feb. 12-Feb. 16, 1977.....	4 days.....	0
	Apr. 8-Apr. 18, 1977.....	10 days.....	
	May 28-June 1, 1977.....	4 days.....	
	July 2-July 11, 1977.....	9 days.....	
	Aug. 7-Sept. 7, 1977.....	31 days.....	
95/2	Feb. 11-Feb. 14, 1978.....	3 days.....	0
	Mar. 24-Apr. 3, 1978.....	10 days.....	
	May 27-May 31, 1978.....	4 days.....	
	June 30-July 10, 1978.....	10 days.....	
	Aug. 26-Sept. 6, 1978.....	11 days.....	
96/1	Feb. 10-Feb. 13, 1979.....	3 days.....	0
	Apr. 11-Apr. 23, 1979.....	12 days.....	
	May 25-May 30, 1979.....	5 days.....	
	June 30-July 9, 1979.....	9 days.....	
	Aug. 4-Sept. 5, 1979.....	32 days.....	
	Nov. 21-Nov. 26, 1979.....	5 days.....	
96/2	Apr. 4-Apr. 15, 1980.....	11 days.....	0
	May 23-May 28, 1980.....	5 days.....	
	July 3-July 21, 1980.....	18 days.....	
	Aug. 7-Aug. 18, 1980.....	11 days.....	
	Aug. 29-Sept. 3, 1980.....	5 days.....	
	Oct. 3-Nov. 12, 1980.....	40 days.....	
	Nov. 26-Dec. 1, 1980.....	5 days.....	
97/1	Feb. 7-Feb. 16, 1981.....	9 days.....	0
	Apr. 11-Apr. 27, 1981.....	16 days.....	
	June 27-July 8, 1981.....	11 days.....	
	Aug. 5-Sept. 9, 1981.....	35 days.....	
	Oct. 8-Oct. 13, 1981.....	5 days.....	
	Nov. 25-Nov. 30, 1981.....	5 days.....	
97/2	Feb. 12-Feb. 22, 1982.....	10 days.....	0
	Apr. 7-Apr. 13, 1982.....	6 days.....	

ADDENDUM II: INTRASESSION ADJOURNMENTS OF CONGRESS,¹ 1974-SEPTEMBER 1986²—Continued

Congress/ Session	Dates of adjournment ³	Length of adjournment ⁴	Number of pocket vetoes
98/1	May 28-June 2, 1982	5 days	0
	July 2-July 12, 1982	10 days	
	Aug. 21-Sept. 8, 1982	18 days	
	Oct. 2-Nov. 29, 1982	58 days	
	Jan. 7-Jan. 25, 1983	18 days	
	Mar. 25-Apr. 5, 1983	11 days	
	May 27-June 1, 1983	5 days	
	July 1-July 11, 1983	10 days	
98/2	Aug. 5-Sept. 12, 1983	38 days	0
	Oct. 8-Oct. 17, 1983	9 days	
	Feb. 10-Feb. 20, 1984	10 days	
	Apr. 13-Apr. 24, 1984	11 days	
	May 25-May 30, 1984	5 days	
	June 30-July 23, 1984	23 days	
	Aug. 11-Sept. 5, 1984	25 days	
	Feb. 8-Feb. 18, 1985	10 days	0
99/1	Apr. 5-Apr. 15, 1985	10 days	
	May 25-June 3, 1985	9 days	
	June 28-July 8, 1985	10 days	
	Aug. 2-Sept. 4, 1985	33 days	
	Nov. 24-Dec. 2, 1985	8 days	
	Feb. 8-Feb. 17, 1986	9 days	
	Mar. 28-Apr. 8, 1986	11 days	
	May 23-June 2, 1986	10 days	0
99/2	June 27-July 14, 1986	17 days	
	August 17-Sept. 8, 1986	22 days	

¹ This table includes intrasession adjournments taken pursuant to concurrent action of the Houses of Congress. See U.S. Const., art. I, § 5, cl. 4.

² This table brings up to date the D.C. Circuit's Appendix in *Kennedy v. Sampson*, 511 F.2d 430, 442-45 (D.C. Cir. 1974). Sources: U.S. Congress, *1985-1986 Congressional Directory* 425-27 (1985); Senate Library, U.S. Senate, *Presidential Vetoes, 1789-1976 (1978)*; Senate Library, U.S. Senate, *Presidential Vetoes, 1977-1984* (1985); 130-32 Cong. Rec. (1984-86).

³ The date of the beginning of each adjournment is the first day on which neither House was in session; the date of the end of each adjournment is the day on which one or both Houses resumed the session. This method, taken from *Sampson*, may understate the relevant length of intrasession adjournments somewhat, because an issue may arise whether a pocket veto or return veto should be used during a portion of any intrasession adjournment when only one House is adjourned. This table does not include such periods.

⁴ The length of adjournment is the number of days on which neither House of Congress was in session. The length represents the number of days from the day after the last House adjourned through the day before either House reconvened. The length may be three or fewer days when the Houses adjourned by concurrent resolution but staggered their break to provide only a short overlap.

ADDENDUM III: PRESIDENTIAL VETOES, 1981-AUGUST 1986¹

Bill	Type of veto	Type and length of adjournment	Date of veto	Cite
97th Congress, 1st Session				
H.J. Res. 357	Return veto	Congress in session	11/23/81	127 Cong. Rec. 28874, 28880-81 (11/23/81).
H.R. 4353	Pocket veto	Intrasession adjournment (39 days).	12/29/81	Senate Journal 701 (Dec. 16, 1981).
97th Congress, 2d Session				
S. 1503	Return veto	Senate in recess for weekend	3/20/82	128 Cong. Rec. 4843, 4893-94 (3/22/82).
H.R. 5118	Return veto	Intrasession adjournment (5 days).	6/1/82	128 Cong. Rec. 12736 (daily ed. 6/2/82).
H.R. 5922	Return veto	Congress in session	6/24/82	128 Cong. Rec. H3919 (daily ed. 6/24/82).
H.R. 6682	Return veto	House adjourned for weekend	6/25/82	128 Cong. Rec. H3972 (daily ed. 6/28/82).
H.R. 6198	Return veto (overridden)	Intrasession adjournment (10 days).	7/8/82	128 Cong. Rec. H3984 (daily ed. 7/12/82).
H.R. 6863	Return veto (overridden)	Intrasession adjournment (18 days).	8/28/82	128 Cong. Rec. H6743 (daily ed. 9/8/82).
H.R. 1371	Return veto	Intrasession adjournment (58 days).	10/15/82	128 Cong. Rec. H8515 (daily ed. 11/29/82).
S. 2577	Return veto	Intrasession adjournment (58 days).	10/22/82	128 Cong. Rec. S13439, S13445 (daily ed. 11/29/82).
S. 2623	Pocket veto	Final adjournment	1/3/83	House Calendar 9-31 (final ed. 1982).
H.R. 5858	Pocket veto	Final adjournment	1/4/83	House Calendar 9-31 (final ed. 1982).
H.R. 3963	Pocket veto	Final adjournment	1/14/83	House Calendar 9-31 (final ed. 1982).
H.R. 9	Pocket veto	Final adjournment	1/14/83	House Calendar 9-31 (final ed. 1982).
H.R. 7336	Pocket veto	Final adjournment	1/14/83	House Calendar 9-31 (final ed. 1982).

ADDENDUM III: PRESIDENTIAL VETOES, 1981-AUGUST 1986¹—Continued

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Bill	Type of veto	Type and length of adjournment	Date of veto	Cite
98th Congress, 1st Session				
S. 366.....	Return veto.....	Congress in session.....	4/5/83.....	129 Cong. Rec. S4154 (daily ed. 4/5/83).
S. 973.....	Return veto.....	Senate adjourned for weekend.....	6/18/83.....	129 Cong. Rec. S8671 (daily ed. 6/20/83).
H.R. 3564.....	Return veto.....	Intrasession adjournment (38 days).....	8/12/83.....	129 Cong. Rec. H6690 (daily ed. 9/12/83).
H.J. Res. 338.....	Return veto.....	Intrasession adjournment (38 days).....	8/13/83.....	129 Cong. Rec. H6690 (daily ed. 9/12/83).
S.J. Res. 149.....	Return veto.....	Intrasession adjournment (38 days).....	8/23/83.....	129 Cong. Rec. S11982 (daily ed. 9/12/83).
H.R. 1062.....	Return veto (overridden).....	House adjourned for evening.....	10/19/83.....	129 Cong. Rec. H8471 (daily ed. 10/20/83).
H.R. 4042.....	Pocket veto.....	Intercession adjournment (65 days).....	11/30/83.....	19 Weekly Comp. Pres. Doc. 1627-28 (11/30/83).
98th Congress, 2d Session				
S. 684.....	Return veto (overridden).....	Congress in session.....	2/21/84.....	130 Cong. Rec. S1389 (daily ed. 2/21/84).
S. 2436.....	Return veto.....	Intrasession adjournment (25 days).....	8/29/84.....	130 Cong. Rec. S10720 * (daily ed. 9/5/84).
H.R. 1362.....	Return veto.....	House adjourned for weekend.....	10/8/84.....	130 Cong. Rec. H11593 (daily ed. 10/9/84).
S. 1967.....	Pocket veto.....	Final adjournment.....	10/17/84.....	131 Cong. Rec. S463 (daily ed. 1/22/85).
H.R. 2859.....	Pocket veto.....	Final adjournment.....	10/17/84.....	130 Cong. Rec. H12291 (daily ed. 11/14/84).

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S. 607.....	Pocket veto.....	Final adjournment.....	10/19/84.....	131 Cong. Rec. S463-64 (daily ed. 1/22/85).
S. 1097.....	Pocket veto.....	Final adjournment.....	10/19/84.....	131 Cong. Rec. S464 (daily ed. 1/22/85).
S. 2166.....	Pocket veto.....	Final adjournment.....	10/19/84.....	131 Cong. Rec. S464 (daily ed. 1/22/85).
H.R. 6248.....	Pocket veto.....	Final adjournment.....	10/19/84.....	130 Cong. Rec. H12291 (daily ed. 11/14/84).
S. 540.....	Pocket veto.....	Final adjournment.....	10/30/84.....	131 Cong. Rec. S462 (daily ed. 1/22/85).
S. 2574.....	Pocket veto.....	Final adjournment.....	10/30/84.....	131 Cong. Rec. S463 (daily ed. 1/22/85).
H.R. 452.....	Pocket veto.....	Final adjournment.....	10/30/84.....	130 Cong. Rec. H12291 (daily ed. 11/14/84).
H.R. 723.....	Pocket veto.....	Final adjournment.....	10/30/84.....	130 Cong. Rec. H12291 (daily ed. 11/14/84).
H.R. 999.....	Pocket veto.....	Final adjournment.....	10/30/84.....	130 Cong. Rec. H12291 (daily ed. 11/14/84).
H.R. 5172.....	Pocket veto.....	Final adjournment.....	10/30/84.....	130 Cong. Rec. H12292 (daily ed. 11/14/84).
H.R. 5760.....	Pocket veto.....	Final adjournment.....	10/30/84.....	130 Cong. Rec. H12292 (daily ed. 11/14/84).
H.R. 5479.....	Pocket veto.....	Final adjournment.....	11/8/84.....	130 Cong. Rec. H12292 (daily ed. 11/14/84).
99th Congress, 1st Session				
H.R. 1096.....	Return veto.....	House adjourned for evening.....	3/6/85.....	131 Cong. Rec. H1106 (daily ed. 3/7/85).
H.R. 2409.....	Return veto (overridden).....	House adjourned for weekend.....	11/8/85.....	131 Cong. Rec. H9974 (daily ed. 11/12/85).
H.R. 3036.....	Return veto.....	House adjourned for weekend.....	11/15/85.....	131 Cong. Rec. H10254 (daily ed. 11/18/85).
H.R. 1562.....	Return veto.....	Congress in session.....	12/17/85.....	131 Cong. Rec. H12830 (daily ed. 12/17/85).
H.R. 1404.....	Return veto.....	Intercession adjournment (31 days).....	1/14/86.....	132 Cong. Rec. H12 * (daily ed. 1/21/86).

ADDENDUM III: PRESIDENTIAL VETOES, 1981-AUGUST 1986¹—Continued

Bill	Type of veto	Type and length of adjournment	Date of veto	Cite
H.R. 3384.....	Return veto.....	Inter-session adjournment (31 days).	1/17/86.....	132 Cong. Rec. H2 : (daily ed. 1/21/86).
99th Congress, 2d Session				
H.R. 2466.....	Return veto.....	Intra-session adjournment (9 days).	2/14/86.....	132 Cong. Rec. H449 (daily ed. 2/18/86).
S.J. Res. 316.....	Return veto.....	Congress in session	5/21/86.....	132 Cong. Rec. S6332 (daily ed. 5/21/86).

¹ This table supplements the information contained in two published compilations of vetoes: Senate Library, U.S. Senate, *Presidential Vetoes, 1789-1976* (1978); Senate Library, U.S. Senate, *Presidential Vetoes, 1977-1984* (1985).

² President Reagan returned bill to Congress, but expressed his view that bill was subject to pocket veto.

(9)
No. 85-781

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JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED
STATES, AND

RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE,
PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP
OF THE UNITED STATES HOUSE OF REPRESENTATIVES

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7728

QUESTIONS PRESENTED

1. Whether the court of appeals correctly recognized the standing of the Senate and House parties in this case to redress the nullification of the lawmaking process when the Executive's asserted pocket veto of H.R. 4042, and the petitioners' ensuing refusal to publish the bill as a law, have resulted in an impasse between the Branches.

2. Whether the court of appeals correctly held that an asserted pocket veto of H.R. 4042 was invalid because the House of Representatives had made adequate provision for return of the bill.

3. Whether the respondents may continue to seek relief from the Executive's refusal to publish H.R. 4042 as a law.

(1)

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE UNITED STATES, AND

RONALD GEISLER, EXECUTIVE CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE U.S. HOUSE OF REPRESENTATIVES

OPINIONS BELOW

The opinion of the court of appeals, Appendix to Petition for a Writ of Certiorari ("App.") 1a-118a, is reported at *Barnes v. Kline*, 759 F.2d 21. The memorandum of the district court, App. 119a-132a, is reported at *Barnes v. Carmen*, 582 F. Supp. 163.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 1984, App. 137a-138a, and a petition for rehearing was denied on August 7, 1985, App. 133a-134a. The petition for a writ of certiorari was filed on Novem-

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ber 5, 1985, and was granted on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 7, Clauses 2 and 3, and Article III, Section 2, Clause 1 of the Constitution, and H.R. 4042, 98th Cong., 1st Sess. (1983), are reproduced in the Brief For the Petitioners ("Exec. Br.") in its appendix at 1a-2a.

STATEMENT

1. On November 18, 1983, Congress presented the President with H.R. 4042, 98th Cong., 1st Sess., a bill concerning human rights certification for El Salvador, which had been passed by majority vote in both Houses. *See Barnes v. Kline*, App. 4a-5a, and App. 141a-145a (text of bill). H.R. 4042 represented the culmination of years of Congressional consideration. In 1981, following thorough consideration at the committee level, on the floor, and in conference,¹ Congress required as a prerequisite for further military aid to El Salvador that the President certify progress in human rights, particularly regarding "investigat[ion] [of] the murders of the six United States citizens in El Salvador." S. Rep. No. 83, 97th Cong., 1st Sess. 76 (1981).² Extensive Congressional consideration continued, particularly regarding the slowness of prosecution for the alleged murderers of four American churchwomen.³ Thus, Congress drew on a record of thorough

¹ See, e.g., H.R. Rep. No. 58, 97th Cong., 1st Sess. 70 (1981); H. Conf. Rep. No. 413, 97th Cong., 1st Sess. 84 (1981); 127 Cong. Rec. S 10295 (daily ed. Sept. 23, 1981) (Sen. Pell, during debate on certification provision) ("The death toll [in El Salvador] for this past year alone is estimated at somewhere between 10,000 to 15,000 people"); *id.* at S 10326-27 (daily ed. Sept. 23, 1981) and S 10401 (daily ed. Sept. 24, 1981) (three Senate roll-call votes regarding the provision).

² The provision was enacted as section 728 of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, 95 Stat. 1555.

³ See *Presidential Certification on El Salvador: Hearings Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. (1982) (Vols. I & II) (ten days of Congressional hearings).

consideration of a highly important issue in enacting H.R. 4042, the 1983 renewal of the human rights certification requirement.⁴

Pursuant to U.S. Const., art. I, sec. 7, cl. 2, the President had ten days (Sundays excluded), or until November 30, 1983, to decide between two courses: to return veto the bill, that is, return the bill to the House of Representatives, the originating chamber, with his objections; or, to let the bill become law with or without his signature. Since Congress adjourned on November 18, 1983, if the President wanted to disapprove the bill, he should have returned a veto message to the Clerk of the House, who would receive it pursuant to H.R. Rule III, Cl. 5. President Reagan has followed this procedure during other adjournments, both prior and subsequent.⁵

However, President Reagan chose not to return veto the bill. Instead, on November 30, 1983, the White House issued a statement announcing a pocket veto. *See Barnes v. Kline*, App. 5a. Executive officials refused to publish H.R. 4042 as a public law of the United States. *See Barnes v. Kline*, App. 6a. The Executive pursued this course despite the settled rule that return of a bill to the Clerk of the House satisfies the Veto Clause's requirements, much as presentation of a bill to the Executive Clerk satisfies the Presentment Clause's requirements for presentation to the President.

2. The plaintiffs, Representative Michael D. Barnes and other individual Members of Congress ("Members"), file

⁴ In light of that prior record, the passage of H.R. 4042 itself was not controversial. 129 Cong. Rec. H777 (daily ed. Sept. 30, 1983) (House passage); *id.* at S16468 (daily ed. Nov. 17, 1983) (Senate passage).

⁵ H.R. Rule III, Cl. 5, reprinted in *Constitution, Jefferson's Manual and Rules of the House of Representatives*, H. Doc. No. 277, 98th Cong., 2d Sess. § 647b (1985) ("House Manual"), provides that "[t]he Clerk is authorized to receive messages from the President and from the Senate at any time that the House is not in session." Previous and subsequent return vetoes during adjournments are listed in notes 40-43 *infra*.

suit against the Executive petitioners⁶ in the United States District Court for the District of Columbia, challenging the pocket veto as a nullification of their votes. Both the Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives ("House parties"),⁷ intervened as plaintiffs to protect the institutional interests of the Senate and House. See *Barnes v. Kline*, App. 3a n.3. On cross-motions for summary judgment, the district court (Jackson, J.) ruled for the Executive defendants on the merits. See *Barnes v. Carmen*, App. 119a-132a. The Members, the Senate, and the House parties appealed. Both in district court and in the court of appeals, the Executive declined to challenge standing. As the court of appeals (Robinson, C.J., and McGowan and Bork, JJ.) later noted, "the Executive Branch itself concede[d]" that "Congress clearly has standing to litigate the specific constitutional question presented." *Barnes v. Kline*, App. 15a, 17a (citing Tape Recording of Oral Argument at 204-11).

3a. On August 29, 1984, the court of appeals ruled in favor of respondents, in a scholarly opinion (issued April 12, 1985) by Judge McGowan. *Barnes v. Kline*, App. 1a-46a. The opinion discussed the facts and prior proceedings, App. 1a-8a, the views of the Framers, and this Court's key prior opinions on the pocket veto: *The Pocket Veto Case*, 279 U.S. 655 (1929), and *Wright v. United*

⁶ By virtue of Pub. L. No. 98-497, sec. 107(d), 98 Stat. 2291 (1984), petitioner Frank G. Burke, Archivist of the United States, has inherited from one of the original Executive defendants the duty of publishing bills that have become law.

⁷ The House parties are the Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives, consisting of the Honorable Jim Wright, Majority Leader; the Honorable Robert H. Michel, Minority Leader; the Honorable Thomas S. Foley, Majority Whip; and the Honorable Trent Lott, Minority Whip. The participation of the Speaker and Bipartisan Leadership Group is the normal mechanism by which the House of Representatives presents its institutional interest in litigation. See note 15 *infra*.

States, 302 U.S. 583 (1938). App. 18a-33a. The court of appeals considered carefully the Executive petitioners' argument "that the truly correct 'bright line' must be drawn at the three-day mark," meaning that "if the tenth day after presentment falls during an adjournment of over three days, a bill that has not yet been returned expires by pocket veto. . . ." App. 42a. In rejecting petitioners' proposed "three-day rule," the court of appeals discussed how this extreme proposal deviated from the practice of the preceding administrations of "Presidents Ford and Carter, both of whom assumed the effectiveness of return vetoes made during such an adjournment." App. 37a.

Judge McGowan relied on this Court's determination that the Pocket Veto Clause's two fundamental purposes are to preserve the President's opportunity "to consider the bills presented to him," and to preserve Congress's opportunity "to consider [the President's] objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." App. 29a (quoting *Wright v. United States*, 302 U.S. at 596). The court of appeals held that return of H.R. 4042 to the House of Representatives would have fully satisfied both purposes. It refused to "grant[] the President an absolute veto [when] Congress has shown no disrespect for the President's role in the enactment process." App. 39a. "The existence of an authorized receiver of veto messages, the rules providing for carryover of unfinished business, and the duration of modern intersession adjournments, taken together, satisfy us that when Congress adjourned . . . return of [H.R. 4042] to the originating house was not prevented." App. 46a.

3b. Judge Bork dissented at length, but only on the standing issue which he raised *sua sponte*. He argued against any of what he termed "'governmental standing,'" App. 54a, a broad view which the Executive has not defended in this Court. The dissent admitted that "[t]he Executive Branch conceded at oral argument . . . in this suit," and conceded "[s]imilarly, in

Kennedy v. Sampson," 511 F.2d 430 (D.C. Cir. 1974), that "either House of Congress would have standing to sue. . . ." App. 49a n.1 (Bork, J., dissenting). By contrast to the dissent, the panel opinion for the court of appeals found a firm basis for according standing to the Houses of Congress, quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939) ("these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes"). App. 15a.

After the Executive petitioners lost on the merits in the court of appeals, they changed position, ostensibly due to "further consideration," Exec. Br. at 4 n.3, and opposed standing in their requests for rehearing and rehearing en banc. The court of appeals found the newly-embraced position unpersuasive.⁸

SUMMARY OF ARGUMENT

On the issue of standing, the court of appeals concluded correctly that "[a]s the Executive Branch itself concedes, Congress clearly has standing to litigate the specific constitutional question presented." App. 15a-17a. In the seminal case of *Coleman v. Miller*, 307 U.S. 433 (1939), this Court expressly upheld legislative standing, finding the requisite injury in the nullification by an executive official of a lawmaking action. *Coleman* set forth the clear reasons, never questioned until now, that sustain standing to challenge such nullification. Legislative plaintiffs alleging nullification of their lawmaking process seek redress for injuries-in-fact, not for mere abstract stigma or conscientious objection. They are not mere concerned bystanders. "They have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect." *Coleman*, 307 U.S. at 438.

Separation of powers considerations strongly support recognition of standing in the unique case presented by

⁸ Of the ten judges considering rehearing en banc, only three even voted to set the matter for argument. App. 135a-136a (denial of rehearing and rehearing en banc).

H.R. 4042 of an impasse between the political Branches. The final votes of the Senate and House to enact H.R. 4042, and the absolute veto which completely nullified those votes, created an impasse occasioning litigation by the Senate and House parties themselves. Accordingly, the court of appeals relied soundly on Justice Powell's analysis in *Goldwater*: "a dispute between Congress and the President is ready for judicial review when 'each branch has taken action asserting its constitutional authority'—when, in short, 'the political branches reach a constitutional impasse.'" App. 14a (quoting *Goldwater v. Carter*, 444 U.S. at 997 (Powell, J., concurring)).

Executive petitioners attempt to analogize this case to a dispute over execution of the law, which it is not, or to an intra-parliamentary dispute. The court of appeals pointed out the crucial difference: "[t]he court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the executive branch." App. 15a.

On the merits, the court of appeals correctly held that H.R. 4042 became a law when the President did not return veto it. As a very narrow exception to the system of return veto and override, the Pocket Veto Clause provides for a veto of a bill without override when "the Congress by their Adjournment prevent its Return." For its operation, that Clause demands that Congress prevent return, not simply that Congress adjourn.

As Presidents of both parties have recognized, return of a bill to an authorized officer of the Congress satisfies both the purposes found by this Court in the Clause. See *Wright v. United States*, 302 U.S. 583 (1933). When Congress makes provision for return during adjournment, the President has his opportunity to consider and approve or disapprove bills. Congress has not "cut down" that opportunity. See *Edwards v. United States*, 286 U.S. 482, 493 (1932). Then, if the President disapproves the bill, his return gives the Congress its reciprocal opportunity to

consider his objections and to decide whether to override. In contrast, barring return during adjournment would in no way aid the Clause's first purpose, for the President would still have only ten days. However, the Framers' second purpose would be defeated, as Congress would be deprived of its right to consider and override the objections.

The Executive proposes a "three-day rule": every adjournment longer than three days would allow pocket vetoes. That "three-day rule" would make the President's veto absolute for most important bills. The court of appeals soundly rejected that "three-day rule." Massive shifts from qualified to absolute veto would utterly violate the Framers' intent. The court of appeals also soundly rejected another possible distinction, of allowing pocket vetoes during intersession but not intrasession adjournments. "Congress' power to override a veto [was] intended to erect [an] enduring check[]," *INS v. Chadha*, 462 U.S. 919, 957 (1983). Preserving the effectiveness of that check requires that the pocket veto be no more than an exception to the general rule.

Finally, petitioners' contention that the case is moot is without merit. The Senate and House parties seek validly to have petitioner Burke publish H.R. 4042 as a public law, as appropriate relief for the injury to their lawmaking process.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT A CONSTITUTIONAL IMPASSE OVER INJURY TO THE LAWMAKING PROCESS WARRANTS JUDICIAL RESOLUTION

A. Pursuant to *Coleman v. Miller*, This Court Recognizes Legislative Injuries and Interests

In this court, the Executive petitioners now deny what they earlier conceded, and contend that the Congressional parties lack standing. Exec. Br. at 12-30. Of course, the House parties agree with the Executive that Article III requires that plaintiffs allege a basis for standing: an

injury-in-fact "fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). As Justice Powell has explained regarding the nature of the injury required for standing, "[n]oneconomic interests have been recognized. *E.g.*, *Baker v. Carr*, 369 U.S. 186 (1962). . . . [But] the Court has not broken with the traditional requirement that . . . a plaintiff must allege some particularized injury that sets him apart from the man on the street." *United States v. Richardson*, 418 U.S. 166, 194 (1974) (Powell, J., concurring).

However, as this Court has held, such injury exists where Executive officials seek to nullify legislative lawmaking processes. In the seminal case of *Coleman v. Miller*, 307 U.S. 433 (1939), this Court found the requisite injury and expressly upheld legislative standing, based on clear reasoning never since questioned. In its key points, *Coleman* closely resembles this case: there, too, legislative plaintiffs brought suit to challenge the alleged nullification of the lawmaking process by an Executive officer.

Coleman involved a resolution of ratification in the Kansas Senate for the proposed federal Child Labor Amendment. "When the resolution came up for consideration, twenty senators [out of a total of forty] voted in favor of its adoption and twenty voted against it. The Lieutenant Governor, the presiding officer of the Senate, then cast his vote in favor of the resolution." 307 U.S. at 436. In response, the twenty senators who had voted against the resolution challenged the Lieutenant Governor's vote by suing to bar formal authentication of the resolution's enactment. *Id.* at 436. On appeal, this Court's "authority to issue the writ of certiorari [was] challenged upon the ground that [the legislative plaintiffs] ha[d] no standing." *Id.* at 437.

The Court determined that the issue concerned federal law and its own Article III jurisdiction, not state law or state court jurisdiction, noting that legislative standing posed "exclusively federal questions and not state questions," *id.* at 438.⁹ Chief Justice Hughes' opinion for the Court defended legislative standing in appropriate cases:

We find the cases cited in support of the contention, that [the senators] lack an adequate interest to invoke our jurisdiction to review, to be inapplicable. Here, the plaintiffs include twenty senators, whose votes against ratification have been overridden and virtually held for naught. . . . We think that these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.

Id. at 438 (footnote omitted). *Coleman* has been followed without reservation by this Court, *see, e.g., Bender v. Williamsport Area School District*, 54 U.S.L.W. 4307, 4309 n.7 (U.S. March 25, 1986) (citing and quoting *Coleman's* discussion of standing), and its clear, logical upholding of legislative standing has governed appropriate cases, such

⁹ The opinion brushed aside the state court's construction of the law in two sentences: "[h]ad the questions been solely state questions, the matter would have ended [in state court]." *Id.* at 437-38. However, "the questions raised in the instant case arose under the Federal Constitution. . . . They arose under Article V of the Constitution. . . ." *Id.* at 438. Executive petitioners attempt to distinguish *Coleman* as a state case, Exec. Br. at 23 n.16, without even addressing this language in the opinion emphasizing the case's federal questions or responding to the other cogent points made by the court of appeals, App. 15a-17a n.15.

The one relevant distinction between Congress and state legislatures—that for Congress, unlike state legislatures, the Speech or Debate Clause limits federal court jurisdiction, Exec. Br. at 23 n.16—supports recognition of standing in this case. That limitation means there is even less potential for federal court jurisdiction over intra-parliamentary lawsuits in future cases involving Congress than there has been in cases involving state legislatures.

as *Dyer v. Blair*, 390 F. Supp. 1291 (N.D. Ill. 1975) (three-judge court) (Stevens, J.).¹⁰

Coleman reviewed the two relevant bodies of case law which sustained legislative standing then as they do in this case. Chief Justice Hughes first examined suits by voters in general elections, the forerunner cases of *Baker v. Carr*. He observed that nullification of legislative votes is at least as tangible and concrete an injury as nullification of votes in general elections; in fact, "[t]he interest of . . . merely qualified voters at general elections is certainly much less impressive than the interest of the twenty senators in the instant case. . . ." *Coleman*, 307 U.S. at 441. Second, the Court examined the standing to sue of such federal independent agencies as the Interstate Commerce Commission, the Federal Trade Commission, and the National Labor Relations Board—commissions that, like the Houses of Congress, are not under Executive control. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935). In answer to the contention that the legislative plaintiffs lacked "private" damages needed for standing, Chief Justice Hughes noted that the "official duties," *Coleman*, 307 U.S. at 442, of such independent agencies sustained standing, just as do the duties of state officers, even though "[i]n none of these [officers'] cases could it be said that the state officers invoking our jurisdiction were sustaining any 'private damage.'" *Id.* at 445.

This Court's rulings have confirmed both of the lines of case law relied upon by *Coleman* and its successor cases. This Court has consistently sustained both the

¹⁰ In *Dyer*, Members of the Illinois Legislature sued to vindicate their vote for the resolution of ratification of the Equal Rights Amendment, challenging defendant officials' contention that the resolution had been defeated because ratification required a three-fifths vote. When defendants challenged the legislators' standing, the court upheld it, noting that "[w]e think plaintiffs' standing is adequately established by *Coleman v. Miller* . . . , and *Baker v. Carr*." 390 F. Supp. at 1297 n.12.

standing to sue of voters in general elections,¹¹ and the standing to sue of independent agencies (so long as the case is not an intra-branch dispute subject to resolution by intra-branch methods).¹² In the years since *Coleman*, this Court has repeatedly sustained the rights of legislators and legislative bodies, in appropriate cases, to seek redress for injuries and to protect their interests. The Court has sustained intervention by the Senate and House parties to defend the constitutionality of statutes challenged by the Executive, *Bowsher v. Synar*, 54 U.S.L.W. 5064 (U.S. July 7, 1986) and *INS v. Chadha*, 462 U.S. 919, 931 n.6, 939, 940 (1983); suits by Members excluded from the Congress, *Powell v. McCormack*, 395 U.S. 486 (1969); and intervention by legislative chambers in challenges to their apportionment, *Sixty-Seventh Minnesota Senate v. Beens*, 406 U.S. 187, 194 (1972) (per curiam) ("certainly the senate is directly affected . . . [and] the senate is an appropriate legal entity for purpose of intervention"); see also *Goldwater v. Carter*, 444 U.S. 997, 1000-01 (1979) (Powell, J., concurring) (justiciability of case involving impasse between the Branches).

Other cases show why *Coleman* and the court of appeals in this case correctly found legislative plaintiffs to have the requisite injury-in-fact. The Court has found no injury-in-fact only in cases involving plaintiffs without tangible rights: those with "mere interest in a problem," *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 226 (1974) (quotation omitted); "concerned by-

¹¹ See, e.g., *Baker v. Carr*, 369 U.S. at 208 (quoting *Coleman* regarding the "plain, direct and adequate interests" of plaintiffs "in maintaining the effectiveness of their votes").

¹² See, e.g., *United States v. Nixon*, 418 U.S. 683, 692-97 (1974) (justiciability of proceeding by independent special prosecutor); *United States ex rel. Chapman v. FPC*, 345 U.S. 153, 154-56 (1953) (standing of Secretary of the Interior; independent Federal Power Commission); *United States v. ICC*, 337 U.S. 426, 430 (1949); cf. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (authority of independent agencies), cited with approval, *Bowsher v. Synar*, 54 U.S.L.W. 5064, 5067 (U.S. July 7, 1986).

standers," *Valley Forge*, 454 U.S. at 473 (quoting *United States v. SCRAP*, 412 U.S. 669, 687 (1973)); persons displaying mere "conscientious objection" to events around them, *Diamond v. Charles*, 54 U.S.L.W. 4418, 4422 (U.S. April 30, 1986); complainants about "abstract stigmatic injury," *Allen v. Wright*, 468 U.S. at 755; and those who present only an asserted "right to a government" of some kind, *id.* at 756 n.21; accord *Diamond v. Charles*, 54 U.S.L.W. at 4421.

Legislative plaintiffs alleging nullification of their law-making process contrast starkly with such "litigants who cannot distinguish themselves from all taxpayers or all citizens." *United States v. Richardson*, 418 U.S. at 192 (Powell, J., concurring). Their injuries rise far above mere abstract stigma, conscientious objection, or bystanders' concern. Legislative plaintiffs sue to protect a right and authority to make laws—a right of which they have been concretely deprived in a specific instance, and a right conferred and defined by the Constitution, obtained and safeguarded through the most determined efforts, held by them closely, shared with no one, and valued for its concrete significance as a cornerstone of representative democracy. Compare *Baker v. Carr*, 369 U.S. at 204-08 (voters have standing regarding dilution of their vote) with *United States v. Richardson*, 418 U.S. at 174-80 (citizens and taxpayers lack such standing).

The legislative plaintiffs in this case clearly possess the minimum injury-in-fact to satisfy the threshold standing requirement. Legislative plaintiffs have standing because "[t]hey have set up and claimed a right and privilege under the Constitution of the United States to have their votes given effect." *Coleman*, 307 U.S. at 438. As Judge Tamm explained in *Kennedy v. Sampson*, a legislator challenging a pocket veto had "alleged that conduct by officials of the executive branch amounted to an illegal nullification not only of Congress' exercise of its power, but also of appellee's exercise of his power. . . . No more essen-

tial interest could be asserted by a legislator." 511 F.2d at 436 (emphasis supplied).

B. The Separation of Powers Favors Judicial Resolution of the Constitutional Impasse in This Case

The House parties recognize that the existence of injury-in-fact alone does not end the standing inquiry. This Court deems "separation of powers" considerations relevant to standing, when plaintiffs seek "systemwide" relief or a "restructuring of the apparatus established by the Executive Branch to fulfill its legal duties." *Allen v. Wright*, 468 U.S. at 760, 761. Relying heavily upon *Allen v. Wright*, the Executive petitioners assert that such separation of powers considerations negate standing in this case. See Exec. Br. at 6, 13, 15, 17 n.11, 20, 21, 22, 23, and 26 (citing *Allen*).

Although this case does present separation of powers considerations, they strongly support, rather than disfavor, standing. The facts of this case involve an impasse between the Houses of Congress and the Executive unresolvable otherwise than through litigation. Recognition of standing in this case enhances, rather than injures, "the ability of the representative branches of the Federal Government to respond to the citizen pressure." *United States v. Richardson*, 418 U.S. at 189 (Powell, J. concurring). Executive Branch interference in the lawmaking of the Legislative Branch brings the two Branches into an unavoidable conflict over the law. This is no internal problem of either Branch. It cannot be resolved by either official directives or collegial debate. The President departed from the normal enactment process in which he exercises his will by a return veto, and the Congress in turn decides whether to override; he made no return of H.R. 4042, and Congress had nothing upon which to operate. With no further interchange, the two Branches froze in their respective positions. What resulted was "an immutable political logjam." *United States v. Richardson*, 418 U.S. at 195 n. 17 (Powell, J., concurring). As Justice Powell explained in *Goldwater v. Carter*:

If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty "to say what the law is."

444 U.S. at 1001.

The impasse present in this case contrasts sharply with the situation in *Goldwater v. Carter*, the last pertinent case with a legislative plaintiff to come to this Court.¹³ In *Goldwater*, the Houses of Congress had not taken final action on the treaty termination issue of the case, and they had not appeared in the litigation. As the court of appeals noted, in *Goldwater*, "'Congress ha[d] taken no official action . . . [and the Court] d[id] not know whether there ever will be an actual controversy between the Legislative and Executive Branches.'" App. 14a (quoting *Goldwater*, 444 U.S. at 998 (Powell, J., concurring)). In this case, by contrast, nullification of the final votes of the Senate and House to enact H.R. 4042, and the intervention of the Senate and House parties to protect their interests, presents a stark controversy between the Branches. The court of appeals pointed out that "a dispute between Congress and the President is ready for judicial review when 'each branch has taken action asserting its constitutional authority'—when, in short, 'the political branches reach a constitutional impasse.'" App. 14a (quoting *Goldwater*, 444 U.S. at 997 (Powell, J., concurring)).

The Executive attempts to analogize this case to an intraparlimentary dispute, contending it will lead to a "plethora of [such] cases," Exec. Br. at 24 n.17 (quoting *Gregg v. Barrett*, 771 F.2d 539, 543 (D.C. Cir. 1985)). *Gregg v. Barrett* concerned an intra-parliamentary dispute be-

¹³ In *Bowsher v. Synar*, the Court deferred resolution of the issue of the standing of a plaintiff Member of Congress. 54 U.S.L.W. at 5066.

tween individual plaintiff Members and individual defendant Members. Such intra-parliamentary disputes differ greatly from inter-Branch impasses between the Houses of Congress on the one side, and the Executive on the other. *Coleman* itself upheld standing because the legislative plaintiffs complaining of Executive vote nullification were a majority controlling their Senate¹⁴ and the Court did not have "a mere intra-parliamentary controversy" before it. 307 U.S. at 441. Similarly, this Court recently distinguished between individual "members of collegial bodies [who] do not have standing to perfect an appeal," and collegial bodies who do have such standing. *Bender v. Williamsport Area School District*, 54 U.S.L.W. at 4309.

This case involves no intra-parliamentary dispute. Both Houses voted for H.R. 4042; both Houses have presented their institutional interest in this case.¹⁵ As Judge

¹⁴ *Coleman* noted that "[h]ere, the plaintiffs include twenty senators. . . . [I]f they are right in their contentions their votes would have been sufficient to defeat ratification." 307 U.S. at 438. Later, the opinion again noted that "the twenty senators were not only qualified to vote on the question of ratification but their votes, if the Lieutenant Governor were excluded . . . would have been decisive in defeating the ratifying resolution." *Id.* at 441; *accord id.* at 446.

¹⁵ The Executive's suggestion that the Senate and House parties lack the authority to present that institutional interest, Exec. Br. at 27 n.20, is without merit. The Speaker and Bipartisan Leadership Group serve as the regular mechanism for the House of Representatives to present its institutional position in constitutional litigation. In *Bowsher v. Synar*, as in cases concerning the 1984 Bankruptcy Act Amendments and the Competition in Contracting Act, the Speaker and Bipartisan Leadership Group presented the institutional interest of the House. The conference report on the Gramm-Rudman act recently noted that regular mechanism in anticipating how *Bowsher v. Synar* would proceed:

It is intended that each body may employ what have developed to be the regular procedures to initiate participation in cases of institutional interest as they have in litigation concerning the 1984 Bankruptcy Act Amendments and the Competition in Contracting Act Amendments.

Continued

McGowan noted: "[t]he court is not being asked to provide relief to legislators who failed to gain their ends in the legislative arena. Rather, the legislators' dispute is solely with the executive branch." App. 15a.¹⁶

The Executive itself has long agreed that the Houses of Congress have standing in a pocket veto case, provided the controversy has risen above an intra-parliamentary dispute. In the pocket veto case of *Kennedy v. Sampson*, the Executive contended that individual Senators lacked standing, but distinguished them from the Senate as a whole. The Executive noted in that case that "the votes of the twenty plaintiffs in *Coleman* had peculiar legal significance as a bloc." *Kennedy*, 511 F.2d at 434 (reciting

Increasing the Statutory Limit on the Public Debt, H.R. Rep. No. 433, 99th Cong., 1st Sess. 100 (1985).

See, e.g., *Bowsher v. Synar* (statute defended by intervenors Speaker and Bipartisan Leadership Group); *Japan Whaling Association v. American Cetacean Society*, 106 S. Ct. 2860 (1986) (brief *amicus curiae* by Speaker and Bipartisan Leadership Group); *Ameron, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 875 (1986) (upholding Competition in Contracting Act defended by intervenors Speaker and Bipartisan Leadership Group), *petition for rehearing pending*, Nos. 85-5226, 85-5377 (argument scheduled for Sept. 15, 1986); *In re Benny*, 44 Bankr. 581 (N.D. Cal. 1984) (upholding Bankruptcy Act Amendments of 1984 defended by intervenors Speaker and Bipartisan Leadership Group), *app. dismissed*, Nos. 84-2805, *et al.* (9th Cir. June 9, 1986); *In re Tom Carter Enterprises, Inc.*, 44 Bankr. 605 (C.D. Cal. 1984) (upholding bankruptcy act defended by intervenors Speaker and Bipartisan Leadership Group); *In re Production Steel, Inc.*, 48 Bankr. 841 (M.D. Tenn. 1985) (same); *Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN (C.D. Cal. opinion filed Nov. 21, 1985) (upholding Competition in Contracting Act defended by intervenors Speaker and Bipartisan Leadership Group), *petition for rehearing pending* (noticed for Sept. 8, 1986); *Pitney Bowes, Inc. v. United States*, No. 85-0832 (D.D.C. filed Mar. 13, 1985) (resolving case without reaching issue of statute defended by intervenors Speaker and Bipartisan Leadership Group).

¹⁶ The Third Circuit made a similar distinction in another case. As Judge Adams stated, while the courts should follow "standards of restraint" in "intra-branch disputes," they should resolve cases when "legislators may show, as in *Coleman* . . . that as an aggregate they constitute a controlling bloc of the legislative branch." *Dennis v. Luis*, 741 F.2d 628, 640 (3d Cir. 1984) (concurring opinion).

the Executive's argument). "[Executive] [a]ppellants insist[ed] that only the interests of the Congress or one of its Houses as a body are protected by this [pocket veto] provision. . . ." *Id.* Accordingly, in that case the Executive conceded that "the Senate or the Congress has sustained the 'direct' injury necessary to confer standing (assuming that the [pocket] veto of S. 3418 was invalid)." *Id.*

In this case, the Executive drew the same sound line again in the courts below. When a judge on the court of appeals questioned standing, Assistant Attorney General Willard explained why the Executive Branch conceded standing. In many respects, his argument offers one of the most persuasive statements of why standing should be recognized:

QUESTION: Why is there Article III standing here? Does the government take the position that there is Article III standing?

Mr. WILLARD: The government conceded in *Kennedy v. Sampson* that the Senate as a body would have had standing in that case, and . . . the Senate is alleging injury to its corporate interests, that is its interests as a body in being able to consider legislation. . . .

My point was simply that this case is different because we have the collective body that is the Senate as a plaintiff here under statutory authority.

QUESTION: That doesn't make any difference—are you saying that doesn't make any difference under Article III standing?

Mr. WILLARD: We believe it does make a difference, that is for Article III purposes because the character of the injury collectively or separate by the Senate is different from that suffered by an individual. . . .

QUESTION: Doesn't the Senate as a body, when it intervenes, represent all citizens?

Mr. WILLARD: I don't believe they claim to do so. . . . [After other questions:] I think they sue in an institutional capacity as one-half of one of the three branches of government.

QUESTION: But does the institution have any interest to assert other than the interests of the citizens generally?

Mr. WILLARD: Yes, Judge Bork, I think it does. I think its interest is preserving what is an allocation of powers under the Constitution, just as the Executive has an interest in preserving its institutional—

QUESTION: You have a property right in the Senate as opposed to its representation of citizens, separating the interest of its powers from the interests of the electorate?

Mr. WILLARD: That is correct. . . .¹⁷

The particular competence of the Judiciary regarding the question at issue in this case further supports standing. No question is presented here, as in *Allen v. Wright*, of systemwide relief, of how to enforce the law, or of other concerns arguably within the peculiar competence of the Executive Branch. To expand the principle of *Allen v. Wright* beyond that case to this wholly different one, which is the main thrust of the Executive argument, would "confus[e] the standing doctrine with the justiciability of the issues that respondents seek to raise." *Allen*, 468 U.S. at 790 (Stevens, J., dissenting).¹⁸ While the Executive tries to import "the considerations underlying the political question doctrine," Exec. Br. at 17 n.11, this case poses no political question. The disputed pocket veto presents a legal issue which this Court alone can resolve definitively. See *Wright v. United States*, 302 U.S. 583 (1938); *The Pocket Veto Case*, 279 U.S. 655 (1929). Only recently this Court thoroughly rejected the argument that the construction of art. I, sec. 7, cl. 2, is a political question, recognizing a judicial duty "from the performance of which [this Court] may not shrink, to give full effect to the pro-

¹⁷ The quotation is from the Transcript of the Argument of June 4, 1984, in *Barnes v. Kline*, at 12-13, 16-17.

¹⁸ The Executive "is really making a political question argument in the guise of standing analysis." *Moore v. U.S. House of Representatives*, 733 F.2d 946, 953 (D.C. Cir. 1984) (Wilkey, J.), cert. denied, 469 U.S. 1106 (1985).

visions of the Constitution relating to the enactment of laws," *INS v. Chadha*, 462 U.S. at 943 (quoting *Field v. Clark*, 143 U.S. 649 (1892)).

As part of its effort to inject political question overtones, the Executive raised the "alternative [of] impeachment by the House . . . and trial by the Senate," Exec. Br. at 19 n.13. That alternative could not be more ill-advised. All the untoward implications of resort to that procedure counsel against its use for a pocket veto question of the type this Court has resolved twice before. Judge McGowan soundly concluded that in an impasse such as this "[t]hat sort of political cure seems to us considerably worse than the disease, entailing, as it would, far graver consequences for our constitutional system than does a properly limited judicial power to decide what the Constitution means in a given case." App. 18a.

II. THE COURT OF APPEALS CORRECTLY DECIDED THAT THIS UNIQUE POCKET VETO CASE PRESENTS AN APPROPRIATE CONTEXT FOR RECOGNIZING STANDING

The Executive makes a familiar "opening of the floodgates" argument, that if the Court did not rule out standing for the Senate and House parties in this case, it would soon find itself inundated with similar litigation. Executive petitioners direly forecast that the courts "would routinely be called upon to resolve disputes between the political branches," and would "assume a role of continual and pervasive intrusiveness into the relationships of the branches." Exec. Br. at 24, 17 (quotation omitted). The reports of this Court since *Coleman* hardly suggest that upholding legislative standing opens such floodgates; the opposite is more nearly true. This Court should always presume that "[t]he courts will exercise appropriate restraints just as they have exercised them in the past," and that its narrow holdings do not mean a "Pandora's box will be opened." *Sierra Club v. Morton*, 405 U.S. 727, 758 (1972) (Blackmun, J., dissenting).

Nevertheless, the House parties share with the Court an appreciation that excessive judicial intervention would

not serve the interests of democracy, particularly since House leaders have themselves been the targets of lawsuits by individual members on internal Congressional matters. The Court properly takes pains to maintain its "principled basis for confining" standing, *Valley Forge*, 454 U.S. at 489, rather than "open the door to a general assault," *id.* at 515 (Stevens, J., dissenting) (quotation omitted). Fortunately, as Judge McGowan's ruling reflected, this case lends itself readily to narrow principles that allay such concerns.

First, the injury from a pocket veto acts in a complete and conclusive fashion on the heart of Congress' role. The cautious and conservative standing analysis developed by Judges Tamm¹⁹ and Wilkey concerning standing in pocket veto cases²⁰ emphasized the distinction between the conclusiveness of nullification in a pocket veto case, which supports standing, and more general allegations, such as in *Goldwater v. Carter*. The legislative plaintiffs in *Goldwater* alleged mere denial of a potential opportunity to vote (regarding treaty termination) but not nullification of actual current lawmaking.²¹ Unlike the situa-

¹⁹ See *Allen v. Wright*, 468 U.S. at 749 n.18 (noting with approval that "Judge Tamm [had] dissented from the holding of the Court of Appeals" and concluded that plaintiffs lacked standing). Judge Tamm was the author of *Kennedy v. Sampson*.

²⁰ *Harrington v. Bush*, 553 F.2d 190, 211 (D.C. Cir. 1977) (Wilkey, J.) ("[i]n *Kennedy* the injury . . . was the effective disenfranchisement of the legislator . . . [for] the Senator's vote was rendered a direct and immediate nullity, as if he had not cast the vote at all. . . . [N]ullification of a specific vote [was] the requisite injury in fact"); accord, *Moore v. United States House of Representatives*, 733 F.2d at 952 (Wilkey, J.) ("the nullification of a legislator's vote by illegal Executive action, may give rise to standing if the injuries are specific and discernible").

²¹ Judge Tamm joined in an opinion distinguishing *Goldwater* from *Kennedy v. Sampson* on standing grounds. "Under the paradigm of injury emerging from *Kennedy*, if the legislature manifests its will through final legislative action, and if the Executive nullifies the effect of that legislative action, a legislator whose vote contributed to the legislative action will have standing. . . . We have required the

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tion in *Goldwater*, a pocket veto nullifies an enactment process that has already completed every step of consideration, amending and final passage.²²

The Executive injury in this case strikes at the very center and heart of Congress' role, not at some non-law-making function.²³ As Hamilton said, "What is a LEGISLATIVE power but a power of making LAWS?" *The Federalist* No. 33, at 202 (Rossiter ed. 1966). This Court has repeatedly stressed the centrality of lawmaking as a Congressional function. "[T]he Constitution is neither silent nor equivocal about who shall make laws. . . . [T]he first section of the first article says that 'All legislative Powers herein granted shall be vested in a Congress of the United States'. . . ." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-88 (1952). Justice Powell recently stated: "It is the peculiar province of the legislature

plaintiff legislator to show that the challenged Executive action has nullified a vote already taken. . . ." *Goldwater v. Carter*, 617 F.2d 697, 711-12 (1979) (Wright, C.J., and Tamm, J., concurring) (citations and footnote omitted), *vacated on other grounds*, 444 U.S. 997 (1979).

Subsequently, a different threshold barrier evolved, known as "remedial" or "equitable" discretion, based on a perception "[i]n the aftermath of *Goldwater* . . . [that] [t]he Supreme Court does not appear inclined to employ standing at all" for legislative plaintiffs. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 Ga. L. Rev. 241, 250 (1981). However, before the emergence of that doctrine, the narrow analysis of standing by Judges Tamm and Wilkey had previously shown how legislative standing could be fenced into a tight area with the pocket veto case at its center.

²² In that respect, this case is clearer even than *Coleman*. In *Coleman*, it could have been argued that the disputed resolution was only a step in the larger process of amendment ratification, rather than a full-fledged enactment such as H.R. 4042.

²³ Cf. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979) (non-lawmaking function of informing the public); *United States v. Brewster*, 408 U.S. 501 (1972) (non-lawmaking function of aiding constituents). In fact, even the legislative function as performed individually or in committee, although protected against suits by the Speech or Debate privilege, see, e.g., *Gravel v. United States*, 408 U.S. 606 (1972), is not the same for standing purposes as the power to enact laws possessed institutionally by the Houses of Congress.

to prescribe general rules for the government of society," *INS v. Chadha*, 42 U.S. at 967 (Powell, J., concurring) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)).²⁴

Executive petitioners criticize the court below for "erroneously attribut[ing] to Congress a legally cognizable interest . . . in overseeing the manner in which the Executive Branch interprets and executes the laws." Exec. Br. at 20. Nothing could be further from what the court of appeals actually held. Executive nullification of the lawmaking process, implemented by refusal to publish H.R. 4042 as a law, differs sharply from disputes over agency execution of the laws. Executive nullification occurs only in the special context of the constitutional enactment process of the Congress and the President in their unique lawmaking interaction; oversight disputes concern the adequacy of execution of law and occur throughout the multifarious contexts of the various departments, Congressional committees, and government activities. A case concerning Executive nullification of lawmaking reaches only the fundamental and antecedent question of whether law has been made, not the multitude of subsequent questions that may arise about the implementation of the law after it is made.

Suits by legislative bodies regarding lawmaking do not in themselves constitute execution of the law,²⁵ and this

²⁴ "[T]he rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power. . . ." *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (quoting *Hampton & Co. v. United States*, 276 U.S. 394 (1928)), and " '[l]egislative power, as distinguished from executive power, is the authority to make laws,' " *id.* at 139 (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928)).

²⁵ In its most extreme form, the Executive appears to argue that no suit by a legislative entity could ever be valid, because the very act of suing would violate an asserted Executive monopoly on access to the courts pursuant to the "faithful execution" clause. Exec. Br. at 19. This argument is without merit, for legislative bodies and agencies may validly conduct lawsuits concerning legislative authority to make

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lawsuit's every material aspect—its plaintiffs, defendants, and relief sought—differs sharply from a suit concerning

law. For example, suits and applications to the courts in aid of investigations by legislative commissions and committees occur often, for they serve legislative authority to make law. See, e.g., *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 201 (1946); *Interstate Commerce Comm'n v. Brimson*, 154 U.S. 447 (1894); *Senate Permanent Subcommittee on Investigations v. Cammisano*, 655 F. 2d 1232 (D.C. Cir.), cert. denied, 454 U.S. 1084 (1981); *Application of United States Senate Select Committee on Presidential Campaign Activities*, 361 F. Supp. 1270 (D.D.C. 1973).

Consideration of the "faithful execution" clause shows its purpose was entirely different than the one hypothesized by the Executive, of creating a monopoly on access to the courts. The clause took its inspiration from the English Bill of Rights, enacted after the Stuart Monarch James II was forced into exile by the Glorious Revolution of 1688. A major provision of the English Bill of Rights declared "that the pretended power of suspending of laws, or the execution of laws by regall authority, without consent of Parlyament, is illegal." 1 W. & M., sess. 2, ch. 2 (1688).

"Scholars have concluded that the 'faithful execution' clause of our Constitution is a mirror of the English Bill of Rights' abolition of the suspending power [...] that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of Suspending' " [the execution of laws.]

Ameron, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. 750, 755 (D.N.J. 1985) (quotation omitted), *aff'd* 787 F.2d 875 (3d. Cir. 1986), *petition for rehearing pending*, Nos. 85-5226, 85-5377 (argument scheduled for Sept. 15, 1986). See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J., concurring); *The President's Suspension of the Competition in Contracting Act is Unconstitutional*: H.R. Rep. No. 138, 99th Cong., 1st Sess. 10 (1985); *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 263-67 (1985); *Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 885-87 (1980); Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 Hastings Const. L.Q. 309, 321 (1975); Stewart, *The Trial of the Seven Bishops*, Cal. St. B.J., Feb. 1980, at 70 (account of the 1688 case underlying the provision).

execution of the law.²⁶ The Senate and House parties, as plaintiff-intervenors, are protecting their institutional interests, not appearing as subjects of the human rights certification process of H.R. 4042. The Executive defendants are not the State Department officials with duties relating to El Salvador who would execute H.R. 4042, but the Executive Clerk and Archivist who process a bill and promulgate it into law.²⁷ The relief sought by the Senate and House parties was not an order to issue human rights certifications for El Salvador, but an order declaring that H.R. 4042 is a law and that it shall be promulgated.

In sum, this case presents neither a disagreement over execution of the law nor an intra-parliamentary dispute. It concerns a conflict between the Senate and House parties, and the Executive, over Executive nullification of the making of H.R. 4042 into law—a conflict which has

²⁶ *Coleman* and *Goldwater* illustrate this distinction. The legislators suing in *Coleman* sought relief against the authentication of the resolution of enactment, not relief against the execution of the Child Labor Amendment. The *Goldwater* plaintiffs sought relief against the denial of a legislative opportunity, not an absolute guarantee of future defense of Taiwan. This Court viewed those cases on their own terms, addressing the pertinent threshold problems for a suit concerning legislative action or denial of an opportunity for legislative action, rather than the very different problems of a suit concerning execution of a constitutional amendment or treaty.

As noted above, Judges Tamm and Wilkey explained in detail the soundness of recognizing standing in a pocket veto case. They distinguished such a case sharply from general complaints about execution of the laws. *Harrington v. Bush*, 553 F.2d at 211; *Moore v. United States House of Representatives*, 733 F. 2d at 952.

²⁷ Executive petitioners argue that respondents cannot "sue the Archivist or the Executive Clerk—inferior officers who are subordinate to the President—in order to collaterally attack such a decision by the President." Exec. Br. at 30 n.23. Quite the contrary, to challenge such decisions, not only can the President's subordinates be named as the defendants, but in fact they are the preferred parties to name as defendants. *Nixon v. Fitzgerald*, 457 U.S. 731, 754 n.36 (1982); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

resulted in impasse. This conflict and impasse present a case or controversy to this Court.

III. THE COURT OF APPEALS CORRECTLY APPLIED THE SETTLED RULE AGAINST POCKET VETOES OF H.R. 4042

The court of appeals correctly held that H.R. 4042 became a law when the President did not return veto it. Article I, sec. 7, cl. 2 grants the President one of his greatest powers, namely, the power to review every bill enacted by the 435 Representatives and 100 Senators representing the entire nation, and to veto any bills of which he disapproves. Considering the enormous range and importance of American legislation today, few powers ever vested in any individual in peacetime compare in significance with the veto power. The Constitution subjects that awesome power to only one limit; the right of the people to override a veto by a two-thirds vote of their representatives in each House. A President can erect a high barrier to legislation so long, but only so long, as his position has the modicum of persuasiveness necessary to retain the support of one-third plus one of the Members of either House.

Having carefully established so nice a balance, the Framers created the pocket veto not to upset that balance, and not to give the President an even greater and indeed absolute voice in lawmaking, but only for the narrowest of purposes. They provided the pocket veto to assure that the President would not be deprived of his ten days for considering bills, by allowing a bill to be absolutely vetoed when "the Congress by their Adjournment prevent [the bill's] Return." U.S. Const., art. I, sec. 7, cl. 2. Congress did not prevent the return of H.R. 4042, but instead made ample provision for the President to return veto the bill. Giving the President an absolute veto in such circumstances would violate the Framers' intent and upset the balance between the political branches.

A. The Rule Against Pocket Vetoes During the Congress Accords With the Pocket Veto Clause's Plain Wording and Intent

A clear procedure, well settled between Congress and the President until the actions in this case, specifies the process for return vetoes during adjournments and requires that the President make such return vetoes, rather than pocket vetoes, during adjournments other than the final adjournment of the Congress. The Framers set forth the procedure for the President to disapprove a bill presented to him: "[i]f he approve [the bill] he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated," art. I, sec. 7, cl. 2. In this same clause, the Framers conferred upon Congress the authority to override, by

proceed[ing] to reconsider [the bill]. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.

Id. As a very narrow exception to the procedure of return veto and override, the Constitution provides for a pocket veto without override when Congress denies the President his ten days for consideration:

If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Id. The established rule, the history of which is discussed below, requires a return rather than a pocket veto during an adjournment when Congress provides for a return by authorizing receipt by the House Clerk or Senate Secretary.

That rule accords with the Clause's plain language. A President can pocket veto a bill only when "the Congress by their Adjournment *prevent* its Return." *Id.* (emphasis supplied). The Clause's verb states its active principle:

whether the Congress "prevent" return. The Clause's focal consideration, the cause of a pocket veto, is prevention of return, not adjournment; as the court of appeals observed, "[o]nly those adjournments that actually prevent return create the opportunity for a pocket veto." App. 44a. "[B]y their Adjournment" is a parenthetical phrase which merely explains when the Congress may prevent return. The Pocket Veto Clause should be interpreted so as to give meaning to all of its language. It should not be interpreted to ignore the active principle of the Clause, expressed in its focal verb regarding whether Congress "prevent" return, thereby giving sole significance to a parenthetical explanatory phrase.

Had the Framers wished to prescribe adjournment as the test, rather than prevention of return, the Clause would read simply that a bill not signed by the President shall be a law "unless the Congress has Adjourned." With this language, shorter and simpler by half than the actual words ("unless the Congress by their Adjournment prevent its Return"), the Framers would have empowered the President to pocket veto during every adjournment of the Congress, exactly as Executive petitioners wish. However, the Framers did not word the Clause thusly. They drafted fuller and very different language expressly focusing on prevention of return, to distinguish between Congresses which "prevent" return and Congresses which do not. The express language of the Clause thereby allowed for the settled rule that when the Congress does not prevent return, but instead provides for return, the President shall return veto rather than pocket veto.

The intent of the Clause, discussed by this Court in two cases, further confirms the soundness of the settled rule. In both *Edwards v. United States*, 286 U.S. 482 (1932), and *Wright v. United States*, the Court held that adjournments lack significance unless they interfere with the purposes of art. I, sec. 7, cl. 2. In *Edwards*, the Court held that adjournment did not prevent the President from considering and signing bills. "[M]erely because the Congress

has adjourned" does not "cut down" the "opportunity of the President to examine and approve bills," 286 U.S. at 493. Similarly, in *Wright*, the Court held that the President could not pocket veto a bill during a three-day recess of the Senate. Instead, Congress's provision for return of a veto message to the Secretary of the Senate provided a fully adequate means of return.²⁸

These holdings relied on the twin purposes of the veto provisions. In *Edwards*, the Court noted that the Framers intended "[t]o safeguard the opportunity of the President to consider all bills presented to him"; they also intended "to safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves." *Id.* at 486. In *Wright v. United States*, that Court again specified the "two fundamental purposes" of the Clause, stating that "[w]e should not adopt a construction which would frustrate either of these purposes." 302 U.S. at 596. The Framers intended "that the President shall have suitable opportunity to consider the bills presented to him;" also, "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes." *Id.*

Like the practices upheld in *Edwards* and *Wright*, returning the President's veto to the designated officers of each House serves both the Clause's purposes, while barring such return would undermine totally the Framers' intent to allow Congress to override. When Congress makes provision for return during adjournment, the President has his opportunity to examine, consider, and approve or disapprove bills. Congress has not "cut down" that opportunity. *Edwards*, 286 U.S. at 493. Then if the

²⁸ In contrast, in the 1929 *Pocket Veto Case*, the Court upheld a pocket veto which occurred during a period when Congress had prevented a bill's return: an adjournment of five and a half months between regular and lame duck sessions of a Congress, during which the chambers did not attempt to authorize the House Clerk or Senate Secretary to receive return veto messages.

President disapproves the bill, his return to the authorized officer gives the Congress its reciprocal opportunity to consider the President's objections and to decide on overriding. In contrast, barring return during adjournment would in no way aid the Clause's first purpose of protecting the President's ten days. It would not give the President any greater opportunity to examine and consider bills; he would still have only ten days to decide whether to sign. What would change is that the President's veto would become an absolute pocket veto, utterly defeating the Clause's second purpose by completely preventing Congress from considering and overriding objections by two-thirds of each House.

House Rule III, Cl. 5 authorized the Clerk of the House to receive messages during the adjournment in question in this case, and the President could have returned H.R. 4042 with his objections to the Clerk.²⁹ Such provision for return was entirely adequate. At one time, this Court doubted, on a hypothetical basis, the sufficiency of such a provision for return. The opinion in the 1929 *Pocket Veto Case* commented that "delivery of the [return voted] bill to some individual" might be "fictitious," 279 U.S. at 685. That statement was purely hypothetical and clearly dictum.³⁰

²⁹ This is the same mechanism by which the House receives messages from the Senate during adjournment. The House adopted the rule pursuant to art. I, sec. 5, cl. 2, which provides that "[e]ach House may determine the Rules of its Proceedings." *INS v. Chadha* confirmed that pursuant to that Clause, each House may govern "internal matters," 462 U.S. at 956 n. 21. Provision for receipt of messages is obviously such a matter. Thomas Jefferson, in compiling his manual of legislative procedure when he was Vice President (and thus the Senate's presiding officer), devoted an entire chapter to the handling of messages, all based on internal procedures of Parliament. See *House Manual*, *supra* note 5, §§ 560-71.

³⁰ Not only does *The Pocket Veto Case* itself indicate the statement was dictum, by pointing out that the Congress had not authorized an officer so that such a situation was not before the Court, but in *Wright v. United States*, 302 U.S. at 593-94, the Court again indicated the

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Only in *Wright v. United States* was the matter presented concretely, and there the Court upheld return to an authorized officer as adequate. The Court overruled its prior contrary 1929 indications,³¹ agreeing with counsel for the House of Representatives that "[t]he Houses of Congress have officers and agents of great power and responsibility who act in their stead, and who are constantly in their places when the Houses . . . are not in session." 301 U.S. at 591 (quoting the argument that had been presented in *The Pocket Veto Case* by Representative Hatton W. Sumners, on behalf of *amicus curiae* Committee on the Judiciary of the House of Representatives). There was "nothing in the Constitution which denies the right to the use of these agents in effecting the return of objected-to bills." *Id.* at 591.

Although the Executive wisely abandons in this Court some of its challenges below to the adequacy of return to an officer, it continues to press others. In the courts below, the Executive had argued that the Clerk of the House might "be absent, sick or dead, or may refuse to accept the message," or that "[d]elivering a veto message to a Congressional agent is not the same act of public notoriety that the Framers contemplated" for vetoes.³² The

statement was dictum. Regarding that language in *The Pocket Veto Case*, then-Assistant Attorney General for Legal Counsel William H. Rehnquist testified: "I think most people would concede that was what you might call dicta that was not necessary to the decision in the case. . . ." *Constitutionality of the President's "Pocket Veto" Power: Hearing Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 18 (1971).

³¹ Regarding its previous statements in the *The Pocket Veto Case*, the Court noted "[t]he oft-repeated admonition of Chief Justice Marshall 'that general expressions, in every opinion . . . [if they go] beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.'" 302 U.S. at 593-94 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

³² Points and Authorities in Support of Defendants' Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Preliminary and Permanent Injunction at 39 n.27.

Executive does not appear to be pressing those arguments in this Court, and in fact *Wright v. United States* laid them to rest.³³ Just as bills are presented to the President and returned by him through his Executive Clerk, even when the President is absent,³⁴ and written submissions are made to this Court through its Clerk even during the summer recess, so messages are received for the House by its Clerk during an adjournment. The court of appeals correctly noted that return to the House Clerk occasions no uncertainty: "the time of delivery is recorded on the journal of the respective house, and the message is retained by the authorized officer for presentation on the floor of the house immediately upon the house's reconvening. The return may thus 'be accomplished as a matter of public record accessible to every citizen.'" App. 35a-36a (footnotes omitted) (citing *Kennedy v. Sampson*, 511 F.2d at 441).

In this Court, the Executive makes only one criticism of return to authorized officers, apart from its formalistic arguments for the "three-day rule" discussed below. The Executive contends that when the President vetoes a bill, he creates "a matter of profound urgency," and that a return veto during an adjournment does not provide an opportunity for "immediate resolution of the disagreement." Exec. Br. at 38, 39. This criticism deems "immediate resolution" so essential that an absolute veto for the President is preferable to any delay.

Neither the Clause's wording nor its traditional operation supports such an argument. When the Framers

³³ The Court agreed with the reasoning of counsel for the House of Representatives that allowing what was termed "constructive delivery" made sense. The alternative was to "require in every instance the persons who constitute the Houses of Congress to be in formal session in order to receive bills from the President," which "would also require the person who is President personally to return such bills. . . ." 302 U.S. at 591-92 (quotation omitted).

³⁴ *Eber Bros. Wine & Liquor Corp. v. United States*, 337 F.2d 624 (Ct. Cl. 1964) (bill may be presented while the President is overseas), cert. denied, 380 U.S. 950 (1965).

wanted to write a time limit into the Clause, they knew how to. They specified for the President "ten Days (Sundays excepted)" to sign or to veto. No such time limit for Congressional override was written into the Clause, and the Executive brief conspicuously lacks even one quote from the Framers supporting the theory of a constitutional imperative to swift resolution. Quite the contrary, the Framers drafted the Clause to resolve override efforts deliberately rather than hastily.³⁵

It has long been established that there is no need for immediate resolution. As the court of appeals noted, "neither the Constitution nor the rules of either house place any time limit on reconsideration of returned bills." App. 34a n.27. A veto override can wait longer than the length of an adjournment: a veto received during one session can await the end of the session in which the veto occurred, plus the length of the next adjournment, plus a period of indefinitely long length in the next session, before resolution of an override effort. For a recent example of such deferred consideration, on December 17, 1985, the President return vetoed a bill regarding textile imports, and the House did not undertake its vote on override of the

³⁵ If the Framers felt the "urgency" attributed to them by Executive petitioners, they would have drafted the override provision with one obvious difference: letting both Houses consider the veto at the same time. For both Houses to consider the veto would speed up consideration, and would bring the override question to a much quicker conclusion on the frequent occasions that the non-originating House is willing to sustain the veto in short order.

Instead, the Framers established a very deliberate process that proceeds linearly from one step to the next, without shortcuts. First, the vetoed bill must return "with [the President's] Objections to that House in which it shall have originated." Art. I, sec. 7, cl. 2. There it starts its first reconsideration. Then, "[i]f after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House." *Id.* There it starts its second reconsideration. This procedure excludes simultaneous reconsideration by the two Houses or early action by the non-originating House. It signifies that if anything, the Framers put a premium, not on "urgency," but on avoiding hasty action.

veto until August 6, 1986.³⁶ That eight-month delay, which occasioned no constitutional or procedural question whatsoever, was over seventy times as long as the three-day limit that the Executive petitioners want as an absolute ceiling.³⁷

This Court does not construe the Pocket Veto Clause as requiring "hurried and inconsiderate examination of bills," *Edwards v. United States*, 286 U.S. at 493. In this case, the court of appeals held that "the delay is not substantial," being "considerably shorter than the half-year long adjournments common at the time of the *Pocket Veto Case*" in 1929. App. 33a.³⁸ So long as the Congress allows the President his full ten days and does not prevent return or "cut down" his time, the Framers consigned the pace of the Congress's own resolution of a veto issue to the Congress, rather than to the President.

In seeking to extract an absolute veto as the "consequence" for Congress's taking of adjournments, the Executive takes a critical view of adjournment as "premature" action, Exec. Br. at 34, suggesting that adjournment be seen as regrettable if not positively reprehensible. The Executive view is entirely contrary to public understanding of democracy today. It is true that before the era of rapid communications and transportation, the heads of all three Branches—President, Supreme Court and Congress—carried out their appointed roles largely at the seat of the government, and much of the country had to

³⁶ 131 Cong. Rec. H12830 (daily ed. Dec. 17, 1985) (veto message); 132 Cong. Rec. H5541-42 (daily ed. Aug. 6, 1986) (vote).

³⁷ As the Executive admits, the chambers of Congress may deal with veto messages under their procedural rules which allow for full consideration of a veto, including referral to committee and postponement to any later time, Exec. Br. at 38 n.27, as well as debate and, in the Senate, filibuster. *Senate Procedure*: S. Doc. No. 2, 97th Cong., 1st Sess. 628 (1981) (section entitled "Veto, Debate of").

³⁸ This Court has only said previously that return should be "timely," *The Pocket Veto Case*, 279 U.S. at 685, as opposed to the situation in that case, when Congress adjourned for five and a half months.

accept not seeing any of these ruling officials most of the year. However, as the court of appeals noted, "improved transportation and a more burdensome workload have drastically altered the character of the congressional schedule . . . produc[ing] congressional calendars marked by numerous short recesses rather than a single lengthy one." App. 41a n.36 (quotation omitted).

Today, while the President and the Supreme Court still remain in the capital, Congress performs the vital function of keeping the national government in direct touch with the people. Congress adjourns so that its Members may journey back and forth across the continent to their states and districts, explaining national policy, discussing the issues, learning the problems, goals and limits of the country, and confirming to the people that this is a government of them and by them rather than over them. Congress must perform that function year-round, not on the nineteenth-century schedule of one long adjournment and a continuous session. This is no plea to change the Constitution. The Framers in their wisdom drafted the Pocket Veto Clause only to avoid the prevention of return, not to allow absolute vetoes at every adjournment. Congress' procedures have respected the Framers' intent and the President's ten days, and those procedures accord with the Constitution.

B. The Courts and Prior Administrations Settled the Rule

The lower courts, the Congress, and the Executive had settled until this case that during adjournments the President must make return vetoes, and the history of that resolution attests to the soundness of the rule. Consideration of the issue in its modern context began when President Nixon first took the position that he could pocket veto during brief adjournments. Until then, there had been no occasion for a meaningful test of the Executive theories now proposed in the "three-day rule" discussed below. Historically, "[t]here was only one case of a pocket veto during an adjournment of less than ten days—when Lyndon Johnson pocket vetoed a private

relief bill during a nine-day adjournment in 1964," A. Schlesinger, *The Imperial Presidency* 237 (1974), partly because until the late 1930s the nature of sessions and adjournments, and the law regarding returns to an authorized officer, had been in flux.³⁹

Accordingly, the first modern occasion for resolving the question occurred when President Nixon pocket vetoed a bill during a five-day Christmas recess in 1970. Senator Kennedy filed a lawsuit to challenge the pocket veto. The United States Court of Appeals for the District of Columbia Circuit concluded, in *Kennedy v. Sampson*, that by authorizing an officer to receive a veto during the adjournment, Congress had made adequate provision for a return and had not prevented return. Accordingly, the court held the pocket veto invalid.

This sound judicial ruling paved the way for resolution of the issue between the Branches. The Executive defendants in *Kennedy v. Sampson* considered petitioning this Court for certiorari, but decided against doing so. Instead, on April 13, 1976, Attorney General Levi announced the

³⁹ Experience before 1940 does not present a meaningful basis for comparison. As the court of appeals noted, past "practice [is not] particularly relevant here, given that it developed under adjournment conditions markedly different from those prevailing today." App 42a. The older history of pocket vetoes during adjournments cited in part by the Executive, Exec. Br. at 45-46, predated Congress's complete rearrangement of its adjournments after the Twentieth Amendment (the "Lame Duck" Amendment, discussed below) which first applied to the Seventy-Fourth Congress convening in 1935. That older history predated as well this Court's sanctioning of the use of authorized officers to receive return vetoes in *Wright v. United States* in 1938.

The more recent history provided mixed signals. In 1940, President Roosevelt made eight return vetoes—not pocket vetoes—during a ten-day adjournment. United States Senate Library, *Presidential Vetoes, 1789-1976* 310-13 (1978); Exec. Br. at 48 n.35. This suggested recognition after *Wright* of the appropriateness of returns during adjournments. After that, there was only one period shorter than that 1940 experience in which any kind of veto occurred, President Johnson's single 1964 pocket veto of a private bill noted in text, until the new policy of President Nixon was adjudicated in *Kennedy v. Sampson*.

President's decision that he would accept the adequacy of return during adjournment:

President Ford has determined that he will use the return veto rather than the pocket veto during intrasession and intersession recesses and adjournments of the Congress, provided that the House of Congress to which the bill and the President's objections must be returned according to the Constitution has specifically authorized an officer or other agent to receive return vetoes during such periods.

122 Cong. Rec. 11202 (1976) (reprinting statement by Attorney General). The Executive agreed to entry of summary judgment invalidating various pocket vetoes that had occurred during intrasession and intersession adjournments. *Kennedy v. Jones*, 412 F. Supp., 353, 356 (D.D.C. 1976).

Thereafter, Presidents followed that settled rule on a bipartisan basis. As the court of appeals noted, "Presidents Ford and Carter [both] assumed the effectiveness of return vetoes made during such an [intersession] adjournment." App. 37a. President Ford made two return vetoes during intersession adjournments, *id.* 37a n.32. President Carter made a return veto during an intersession adjournment, *id.*

"President Reagan himself has frequently delivered veto messages during an adjournment of Congress." *Id.* 36a n.31. Even before this case, he returned six vetoed bills to the Clerk of the House, and two to the Secretary of the Senate, during adjournments of the Congress.⁴⁰ For example, in 1982, the President disapproved a supple-

⁴⁰ 128 Cong. Rec. H3130 (daily ed., June 2, 1982) (H.R. 5118); 128 Cong. Rec. H3984 (daily ed., July 12, 1982) (H.R. 6198); 128 Cong. Rec. H6743 (daily ed., September 8, 1982) (H.R. 6863); 128 Cong. Rec. H8515 (daily ed., November 29, 1982) (H.R. 1371); 128 Cong. Rec. S13439, 13445 (daily ed., November 29, 1982) (S. 2577); 129 Cong. Rec. H6691 (daily ed., September 12, 1983) (H.R. 3564); 129 Cong. Rec. H6690 (daily ed., September 12, 1983) (H.J. Res. 338); 129 Cong. Rec. S11945 (daily ed., September 12, 1983) (S.J. Res. 149).

mental appropriations bill during an adjournment, by returning the bill with a veto message to the Clerk of the House. First the House, then the Senate, voted to override his return veto and the bill became Pub. L. No. 97-257, 96 Stat. 818 (1982).⁴¹ The same sequence of disapproval by President Reagan during an adjournment, return of the vetoed bill to the Clerk of the House, and override of the veto occurred for a 1982 bill concerning copyrights, which became Pub. L. No. 97-215, 96 Stat. 178 (1982).⁴² H.R. 4042's pocket veto marked no inadequacy in the procedure for returns during adjournments. On the contrary, since H.R. 4042, President Reagan has returned three more vetoed bills to officers of the Congress during adjournments, including two return vetoes during the latest intersession adjournment.⁴³

⁴¹ H.R. 6863, the Supplemental Appropriations Act, 1982, was presented to the President on August 23, 1982. Under H. Con. Res. 399, 97th Cong., 2d Sess., the Congress adjourned on August 20. On August 28, while the Congress was adjourned, President Reagan returned the bill with his objections to the Clerk of the House. On September 8, the Congress reconvened. On September 9 and 10, the House and Senate, respectively, passed the bill over the President's veto. See Congressional Research Service, *Digest of Public General Bills and Resolutions*, 97th Congress, 2d Session, Part I, at 121 (1983).

⁴² H.R. 6198, a bill to extend the copyright law manufacturing clause for four years, was presented to the President on July 1, 1982. Under H. Con. Res. 367, 97th Cong., 2d Sess., the Congress adjourned on July 1. On July 8, while the Congress was adjourned, the President vetoed the bill by returning the bill, with his objections, to the Clerk of the House. On July 12, the Congress reconvened. On July 13, the House and Senate both passed the bill over the President's veto. Congressional Research Service, *supra* note 41, at 93.

⁴³ On August 29, 1984, while the Congress was adjourned, the President vetoed S. 2436, a bill to fund public broadcasting, by returning the bill with his objections to the Secretary of the Senate. 130 Cong. Rec. S10720 (daily ed., September 5, 1984). On January 14, 1986, during the intersession adjournment of the Ninety-ninth Congress, the President vetoed H.R. 1404, a bill to establish a wildlife refuge and training center, by returning the bill with his objections to the Clerk of the House. 132 Cong. Rec. H2 (daily ed., Jan. 21, 1986). On January 17, during that same intersession adjournment, the President vetoed

Continued

Thus, the rule requiring return vetoes, rather than pocket vetoes, during adjournments truly has been settled. It accords with the plain wording of the Constitution, the Framers' intent, the past holdings of the courts, and the bipartisan practices of the Presidents.

IV. NO ALTERNATIVE RULE MAKES SENSE

Two alternatives to the settled rule have been suggested. The Executive proposes a "three-day rule": every adjournment longer than three days would allow pocket vetoes. Another alternative, which no party urges, would allow pocket vetoes during all intersession (but not intrasession) adjournments. Neither alternative makes sense and the court of appeals correctly rejected both.

A. Respondents' Proposed "Three-Day Rule" Would Make the President's Veto Absolute, Utterly Contrary to the Framers' Democratic Intent

Petitioners propose that during every adjournment of the Congress longer than three days in duration, the President should pocket veto rather than return veto. Executive petitioners term this the "well-defined rule that the Pocket Veto Clause applies when 'the Congress' has adjourned," *Petition for Certiorari* at 27-28. Petitioners would tie the pocket veto clause to "the Three-Day Adjournment Clause," *Exec. Br.* at 45, pursuant to which both Houses consent to adjournments over three days. They argue that "whether a bill has failed to become a law by operation of the Pocket Veto Clause must depend upon whether Congress withdrew . . . by bicameral action . . . as the Constitution requires for any adjourn-

H.R. 3384, a reform of the federal employees' health benefits system, by returning the bill with his objections to the Clerk of the House. *Id.* at H2-3. The Executive Brief counts the bills of the previous Ford and Carter Administrations as the "only" instances of return during intersession adjournments, omitting these two return vetoes. *Exec. Br.* at 46-47 & n.34. The President's objections accompanying these 1986 return vetoes explain them as consistent with, but under protest of, the ruling by the court of appeals.

ment of more than three days (Art. I, § 5, Cl. 4)," Exec. Br. at 33.

For the reasons discussed above, the proposed "three-day rule" violates the Pocket Veto Clause. As previously shown, the Clause does not provide for pocket vetoes during every adjournment of the Congress, but only during those adjournments in which the Congress "prevent [the bill's] Return." A test looking solely to whether the Congress has adjourned would read the active principle in the Clause right out of the Constitution. Judge McGowan noted that "the words of the pocket veto clause cannot support the three-day rule," and "[a]ppellees' choice of three days as a bright line thus appears to have no textual grounding at all." App. 44a. The court of appeals aptly deemed the Executive's "distinction between a three-day adjournment and a four-day adjournment" to be "arbitrary." App. 45a. "To choose a three-day line . . . simply because it is a line ignores the [Supreme] Court's mandate and the purpose of the pocket veto clause." *Id.*⁴⁴

Most important, the "three-day" rule would have devastating implications for the balance between the political Branches. To illustrate, the bills reported back from conference committees, typically the most important bills of the Congress, totaled eighty-one in the 1981-82 Ninety-

⁴⁴ In support of their newly-proposed rule, petitioners make soaring statements about the "autonomy immanent in the congressional prerogative of 'adjournment,'" Exec. Br. at 35. Such metaphysics strains credulity when applied concretely to the mixture of three- or four-day weekends, five-day Christmas breaks as in *Kennedy v. Sampson*, and short district work periods, for Members to return to their states and district, as found in the calendar of the Congress. The Executive petitioners purport to find in adjournment, as a "premature withdrawal" of the Congress from its relationship with the President, *id.* at 34, an effective method to avoid the otherwise fruitful interaction of the Branches. However, such "withdrawals" have previously been a fertile source of enacted legislation, as discussed above, see Pub. L. Nos. 97-215 and 97-257, 96 Stat. 178, 818 (1982), not the effective "prevent[ion]" meant by the Pocket Veto Clause.

Seventh Congress of H.R. 4042.⁴⁵ The House parties examined how the three-day rule would apply to each of those bills. Of those eighty-two bills, the President could have pocket vetoed sixty-one, and would have had to return veto only twenty-one, pursuant to petitioners' theory of the three-day rule.⁴⁶ This means that sixty-one out of eighty-two times, petitioners' theory would make the President's veto absolute.⁴⁷ In other words, contrary to the Framers' intent, petitioners would immunize seventy-four percent of the President's vetoes of such bills from any opportunity for Congress to override, while only twenty-six percent would be subject to override.

To check the results of that study, the House parties repeated it for the eighty-three bills through conference of the last Congress, the Ninety-Eighth Congress in 1983-84.

⁴⁵ *The Calendars of the United States House of Representatives and History of Legislation*, printed daily by the House of Representatives pursuant to H.R. Rule XIII, Cl. 6, reprinted in House Manual, *supra* note 5, at § 748a, regularly collects the bills reported back from a conference committee in its second section, the "Bills Through Conference" (beginning in each Calendar on page 2-1). This is the well-known and standard collection of the most important bills for which presentation to the President may be anticipated, due to their having been important enough to warrant a conference, and their having progressed so far (i.e., requiring only adoption of the conference reports for presentation).

⁴⁶ A table of these bills, which was an appendix to the brief for the House parties in the court of appeals, is Addendum I to this brief.

⁴⁷ This results from the typical pattern of passing legislation only a few weeks before adjournments. The relevant period is a few weeks, not just ten days, before adjournments, because after passage, bills still require the preparations called "enrollment" before presentation. Typically it takes several days after a final vote for printing the bills on parchment, and making certain that every word and punctuation mark matches precisely what the Houses decided during the often-complex amending processes of floor and conference consideration. This enrollment requires meticulous and time-consuming checking. See 1 U.S.C. § 106; House Manual, *supra* note 5, §§ 572-577. Thus, the bills subject to pocket veto would include not only those voted on the eve of adjournment, but also those voted considerably earlier but only enrolled in time for presentation on the eve of adjournment.

Pursuant to petitioners' theory of the "three-day rule," the President could have pocket vetoed fifty-five of those bills, and would have had to return veto only twenty-eight.⁴⁸ In sum, in the Ninety-Eighth as in the Ninety-Seventh Congress, petitioners' "three-day rule" would have made the absolute pocket veto the norm, and the qualified veto the exception. As Judge McGowan concluded, petitioners' proposed three-day rule "deprives Congress of the final word on a significant portion of its legislation and grants the President an absolute veto." App. 39a.

Such a massive shift from qualified to absolute veto would utterly violate the Framers' intent. This Court noted the Framers' great concern that the veto be qualified rather than absolute. "In the [Constitutional] [C]onvention . . . [t]he principal points of discussion seem to have been, whether the negative should be absolute, or qualified. . . ." *INS v. Chadha*, 462 U.S. at 946 n.14 & 947 (quoting 1 J. Story, *Commentaries on the Constitution of the United States* 611 (3d ed. 1858)). "Congress' power to override a veto [was] intended to erect [an] enduring check[]" on the President's veto power. *Id.* at 957.

The records of the Constitutional Convention reflect the Framers' firm conviction that the elected Houses representing the entire nation must have the opportunity to override. In debating the Enactment Clause, a majority of delegates to the Constitutional Convention rejected an unlimited veto. They opposed "enabling any one man to stop the will of the whole," since "[n]o one man could be found so far above all the rest in wisdom," 1 M. Farrand, *The Records of the Federation Convention of 1787* 99 (1966 ed.) ("Farrand") (Roger Sherman). They feared that the President would have too much opportunity to increase his own power. *Id.* at 99 (Benjamin Franklin). They considered such an absolute power too reminiscent of British monarchy with its colonial Governors, for which "[a] hatred to its oppressions had carried the people through

⁴⁸ A table of these bills is Addendum II to this brief.

the late Revolution." *Id.* at 102 (George Mason).⁴⁹ James Madison, the oracle on matters of separation of powers, made the decisive argument in favor of a limited veto, as a compromise between an absolute veto and none at all.⁵⁰ As Judge McGowan noted, "[l]ater, Hamilton himself eloquently defended the qualified veto as against the 'more harsh' absolute veto power." App. 21a n.18.

Several of the arguments relied upon by the Framers in establishing a balance between the Presidential return veto, and the Congressional opportunity to override, counsel against unnecessarily aggrandizing the pocket veto by a "three-day" rule. In operation, the pocket veto negates vital aspects of democratic ideals. The President need not even state his objections to a bill which he pocket vetoes, much less persuade others that his objections are sound. Neither he nor proponents of the bill need appeal to their supporters and opponents, to the wavering Members, and to the public, or to make concessions toward those with intermediate views, as both sides must do during the

⁴⁹ The Framers' hostile reaction to the example of the British monarchy has played a key role in this Court's conclusions about the limited nature of Executive powers. See *Youngstown*, 343 U.S. at 640-41 (Jackson, J., concurring); *Fleming v. Page*, 50 U.S. (9 How.) 603, 618 (1850). For examples of that hostility, see, e.g., 1 Farrand at 65 (Pinkney) (fearing power grants that "would render the Executive a Monarchy, of the worst kind, towit [sic] an elective one"); *id.* at 66 (Randolph) (fearing "the foetus of monarchy"); *id.* (Wilson) (agreeing "that he was not governed by the British Model"); *id.* at 83 (Franklin); *id.* at 100 (Butler) ("Gentlemen seemed to think that we had nothing to apprehend from an abuse of the Executive power. But why might not a Cataline or a Cromwell arise in this Country as well as in others"); *id.* at 101 (Mason) ("We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one"); *id.* at 103 (Franklin) ("The Executive will be always increasing here, as elsewhere, till it ends in a monarchy"); *id.* at 113 (Mason).

⁵⁰ "It would rarely if ever happen that the Executive constituted as ours is proposed to be would, have firmness eno' to resist the Legislature, unless backed by a certain part of the body itself," *id.* at 99-100 (Madison). The Framers settled the matter by voting to reject an absolute negative by ten to zero, *id.* at 103, and then agreeing to a two-thirds override, *id.* at 104 (voted in the affirmative without a division).

pendency of an override effort. Regardless of whether a particular veto is sustained, the democratic process during an override effort promotes the resolution of policy conflict through participation and reasoning rather than exclusion and arbitrariness, and reaffirms the primacy of democratic rule. It is alien to the Framers' intent to bar even the mere attempt at override—which must marshal two-thirds in the House and two-thirds in the Senate to succeed, a very high standard indeed—and instead to empower “one man [to] stop the will of the whole.” Farrand at 99 (Roger Sherman).

A “three-day rule” is neither necessary nor beneficial for the Clause's function. As the court of appeals noted, it would “frustrate the goal of protecting Congress's right to overrule presidential disapproval without furthering the goal of protecting the President's opportunity to disapprove of legislation.” App. 45a. The Congressional accommodation, embodied in the House Rule authorizing the Clerk to accept messages whenever the House is not in session, properly preserves both important functions, the Executive's veto and the Congressional override.

B. As All Parties Agree, Intersession and Intrasession Adjournments Cannot be Meaningfully Distinguished

The other alternative to the settled rule would be to allow pocket vetoes during intersession adjournments, but not intrasession adjournments. Ordinarily, each Congress has two sessions, with intrasession adjournments during the sessions, and an intersession adjournment between them. At the close of the second session of the Congress comes the final adjournment when the Congress ends; the court of appeals noted, and all parties agree, that the President can pocket veto during that final adjournment, “because under Article I, section 2, clause 1, that Congress has gone permanently out of existence and therefore cannot reconsider a vetoed bill.” App. 45a. The adjournment during which H.R. 4042 was disapproved was the intersession adjournment of the Ninety-Seventh Congress, and a rule that the President could pocket veto

during intersession, but not intrasession, adjournments would have allowed him to pocket veto H.R. 4042. *The Pocket Veto Case* also concerned an intersession adjournment, and so the court of appeals considered whether a rule specifically for intersession adjournments could be justified, but concluded against it.⁵¹

While on many points the Executive petitioners and the House and Senate respondent parties do not agree, on this one point there is agreement. *No party urges the Court to adopt a rule distinguishing between intersession and intrasession adjournments; no party argues that the distinction between intersession and intrasession adjournments is meaningful.*⁵² Of course, the positions of the political Branches do not bind this Court in its interpretation of the Constitution. See, e.g., *INS v. Chadha*, 462 U.S. at 942 n.13. However, the Branches' agreement on this point takes on significance because of their adversary interests and their otherwise opposed positions in this matter. Based on their extensive interaction over legislation as well as their analysis of the constitutional provisions, both sides refuse to urge such a distinction. The Court may appropriately give weight to the judgment of the political Branches regarding a rule concerning their lawmaking.

In any event, neither the language nor the intent of the Pocket Veto Clause would support such an alternative. The Clause makes no reference to sessions. Instead, it uses a test cued to what Congress does, specifically whether Congress prevents return by adjournment. An early draft of the Pocket Veto Clause contained reference to sessions, but the Framers deleted that language in the

⁵¹ The district court had made this distinction, but had done so under what it felt was the compulsion of *Kennedy v. Sampson*. App. 38a n.33, App. 129a-130a. The court of appeals found no such compulsion, and no such compulsion could apply to this Court. App. 38a n.33.

⁵² From the outset in district court, the Executive petitioners have agreed that there is no practical difference today between intrasession and intersession adjournments. App. 123a (district court); App. 7a, 33a (court of appeals).

final draft.⁵³ As in so many matters, they chose not to impose a rigid framework on the new government, but to use an open-ended test, creating a true Constitution with room for growth.

The Clause's intent and its application to current vetoes also negate such a distinction. As discussed above, this Court has determined that the Clause's purposes are to protect the President's opportunity to consider vetoes and the Congress's opportunity to override. See *Wright v.*

⁵³ As a general matter, "[n]o light is thrown on the meaning of the constitutional [pocket veto] provision in the proceedings and debates of the Constitutional Convention . . .," *The Pocket Veto Case*, 279 U.S. at 675, because in all drafts the Framers used the same phrase as to whether Congress, by its adjournment, prevented a return. However, on this specific detail additional language in the early draft sheds light. James Wilson framed the first draft of the Clause (Document VIII in Farrand's series) with additional language in terms of sessions, or "Meeting[s]":

If any Bill shall not be returned by the Governor within _____ Days after it shall have been presented to him, it shall be a Law, unless the Legislature, by their Adjournment, prevent its Return; in which Case it shall be returned on the first Day of the next Meeting of the Legislature.

2. M. Farrand, *The Records of the Federal Convention of 1787* 161-62 (1966 ed.). "Meeting" apparently referred to the annual session. See U.S. Const., art. I, sec. 4, cl. 2 ("[t]he Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December . . ."). The Clause's final version deleted the language about "Meeting[s]," rejecting the one suggested connection between the pocket veto and the mere succession of sessions in favor of a sole focus on prevention of return. For a detailed description of the drafting of the Pocket Veto Clause, see Kennedy, *Congress, the President, and the Pocket Veto*, 63 Va. L. Rev. 355, 359-62 (1977).

The Executive tries to read more into the change in language, arguing that by changing the prior draft the Framers rejected not merely the couching in terms of "Meeting[s]" but the tolerance for any returns during adjournments. Exec. Br. at 36. This theory goes far beyond the actual language. The drafting changes always kept the same test, of whether the Congress had "prevent[ed] [the bill's] Return." The deletions of language did not put the pocket veto only in terms of adjournments rather than in terms of prevention of return, as the Executive would have it. Rather, the change underscored the Framers' focus on prevention of return.

United States, 302 U.S. at 596; *Edwards v. United States*, 286 U.S. at 486, 493. Modern intersession adjournments neither "cut down" the President's opportunity to consider, *Edwards*, 286 U.S. at 493, nor deprive the Congress of its opportunity to reconsider, any more than intrasession adjournments. The House and Senate do not accord intersession adjournments any special significance,⁵⁴ and so neither does the President. Intersession adjournments cause no lapse in Congress's business, and Congress conducts its business after such adjournments without change. See App. 34a & n.27 (court of appeals' discussion of current Congressional rules).

The situation was starkly different at the time of the readily distinguishable *Pocket Veto Case* in 1929. As the court of appeals noted, prior to the passage of the Twentieth Amendment in 1933, the intersession adjournment "divided two very different sessions of Congress, a 'long' session and a 'lame duck' session," App. 33a n.26. The "lame duck" session was considered to have very different characteristics from the "long" session.⁵⁵ Congress

⁵⁴ Originally, from 1789 to 1818, intersession adjournments did cause legislative business to lapse, following the model of Parliament. *Constitution, Jefferson's Manual and Rules of the House of Representatives*, supra note 5, at § 386. However, in 1818, the House accepted the view that allowing matters to continue in a subsequent session would avoid "unnecessary repetition of labor," and lead to "expedition . . . in acting on the public business," 32 Annals of Cong. 1402 (1818) (Rep. Hopkinson). See generally V. Hind's *Precedents of the House of Representatives* § 6727, at 873 (1906).

The House rule in this regard was made a joint rule with the Senate in 1848. Cong. Globe, 30th Cong., 1st Sess. 994 (1848) (House adoption); *id.* at 1085 (Senate adoption). Both chambers extended the rule to committee business, and it increased in importance. Cong. Globe, 36th Cong., 1st Sess. 1179, 1187 (1860) (House); *History of the Committee on Rules and Administration, United States Senate*, S. Doc. No. 27, 96th Cong., 1st Sess. 28 (1980) (Senate Rule 52 in rule recodification of 1868).

⁵⁵ As the court of appeals noted, "[w]ith many of its members having given up or lost their seats for the following term and with only a few months in which to work, Congress during its second session was unable to give serious consideration to many of the items

Continued

took an adjournment between these very different sessions from summer to winter, lasting, for example, five and a half months in the *Pocket Veto Case*.⁵⁶ In abolishing the annual "lame duck" session, the Twentieth Amendment abolished the difference between sessions, and the reasons for the lengthy break, characterizing the intersession adjournment at the time of the *Pocket Veto Case*.

Today, the intersession adjournment typically serves merely as the break for Christmas and New Year's, a

before it." App. 34a n.26. "[A]djournment of the first session hence in fact often precluded reconsideration." *Id.* The legislative history of the Twentieth Amendment reflects voluminously these pre-Twentieth Amendment circumstances that made the intersession adjournment of that era so significant. See, e.g., *Proposed Amendment to the Constitution of the United States . . . : Hearings Before the House Comm. on Election of President, Vice President, and Representatives in Congress*, 69 Cong., 1st Sess. (1926); *Proposed Constitutional Amendments . . . : Hearings Before the Comm. on Election of the President, Vice President, and Representatives in Congress*, 71st Cong., 2d Sess. (1930); *Amendment to Constitution Relating to Election of President, Vice President, and Representatives of Congress: Hearings Before House Comm. on Rules*, 71st Cong., 3d Sess. (1931); *Proposed Constitution Amendment: Hearing Before the House Comm. on the Election of the President, Vice President, and Representatives in Congress*, 72nd Cong., 1st Sess. (1932).

Representative Celler gave a typical description of the different character of the "short" or "lame duck" session of that era, by describing the Members who populated it: "A lame duck . . . is usually tractable, docile, and is easily tamed. So it is with lame ducks in this House. . . ." 75 Cong. Rec. 3828 (1932). He noted specifically a consideration that made such lame ducks poor choices for independent evaluation of Presidential vetoes: they "have been hit with the shot of defeat by their constituents, and they become very lame, docile, and tractable, and when they have jobs dangled before them they do the bidding of the Executive or those who may be in power." *Id.*

⁵⁶ As the court of appeals observed, at that time "[t]he first session of each Congress began on the first Monday in December, as provided in U.S. Const., art. I, § 4, cl. 2, and usually, lasted well into spring. The second session commenced the following December, after the November congressional elections, and had to adjourn by March 3." App 33a-34a n.26.

function served before the Twentieth Amendment by the intrasession adjournment. See *Kennedy v. Sampson*, 511 F.2d at 442-45 (listing pre-1933 intrasession adjournments). As the court of appeals noted, "[i]n stark contrast to the five or six month intersession adjournments typical at the time of the *Pocket Veto Case*, intersession adjournments of the modern era have an average length of only four weeks, and are thus often even shorter than intrasession adjournments." App. 33a. Petitioners agree that the duration of intersession adjournments has correspondingly diminished, *Petition for Certiorari* at 23, as befits their current role. Consequently, neither Branch urges that the distinction between intersession and intrasession adjournments should be accorded any significance, and it has no significance.

V. THE CASE IS NOT MOOT

Finally, petitioners' contention that the case is moot is without merit. The Senate and House parties seek as relief the publication of H.R. 4042 as a public law.⁵⁷ Petitioners contend that because H.R. 4042 applies to a past fiscal year, publication of the bill now would vindicate no interest and that the case is moot. *Exec. Br.* at 9-12. However, the Senate and House parties' interest is in the law-making process, not execution.⁵⁸ Petitioner Burke publishes all laws enacted by the Congress, whatever their duration, including many that have expired.⁵⁹ The Senate and House parties validly seek to have petitioner Burke publish H.R. 4042 as a public law as relief from

⁵⁷ H.R. 4042 has still not been published as a law, despite the declaratory judgment entered below pursuant to the mandate of the court of appeals.

⁵⁸ Additionally, questions remain about the significance of the fiscal year to which the statute applies, in light of the Executive's continuing responsibilities to account for that period. These are addressed in the Senate brief.

⁵⁹ See, e.g., H.J. Res. 653, 656, 659, 663, 98th Cong., 2d Sess. (1984) (respectively Pub. L. Nos. 98-441, 98-453, 98-455, and 98-461, 98 Stat. 1699, 1731, 1747, and 1814) (continuing resolutions enacted, respectively, October 3, 5, 6, and 10, each expiring almost immediately).

the nullification of their lawmaking processes. Petitioners offer no cogent reason why this law, unlike all others, should go unpublished, only variations on their previously discussed argument against standing. As a court noted in rejecting a similar mootness argument in a previous pocket veto case, "[t]o date the defendants have not published H.R. 10511 and H.R. 14225 [two pocket vetoed bills] as laws and it is their failure to perform this duty which is in contest here." *Kennedy v. Jones*, 412 F. Supp. 353, 356 (D.D.C. 1976).

Petitioners' analogy to *National Organization for Women, Inc. (NOW) v. Idaho*, 459 U.S. 809 (1982), is far-fetched. In that case, states sued to require acknowledgment of their asserted rescission of the ratification of the proposed Equal Rights Amendment. When the amendment failed, this Court held the case moot. Petitioners err in contending that H.R. 4042 "can enjoy no greater legal status at this late date than could the unsuccessful constitutional amendment at issue in *NOW*." Exec. Br. at 12 n.7. That amendment failed. H.R. 4042 became law. There is no comparison between the mere desire in *NOW v. Idaho* to record an unsuccessful effort at enactment, and the interest here in vindicating the successful lawmaking process. That interest can be vindicated and the injury rectified, and they should be.

CONCLUSION

This case presents a narrow question of whether standing exists when Congress and the President reach an impasse over a justiciable question of the lawmaking process which only this Court can resolve. The Executive proposes a "three-day rule" which would make the absolute Presidential pocket veto the rule for important bills, and the qualified veto the exception. Quite properly, the court of appeals rejected that as contrary to the Framers' intent. This Court should uphold standing, reject the proposed expansion of the absolute veto, and affirm the court of appeals, in declaring H.R. 4042 to be a law.

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SEPTEMBER 1986.

ADDENDUM I: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
1	H.R. 3512.....	Supplemental Appropriation and Recession Act.	June 5, 1981.....	In session.....	No.....	P.L. 97-12.
2	H.R. 3520.....	Steel Industry Compliance Extension Act.	July 8, 1981.....	In session.....	No.....	P.L. 97-23.
3	H.R. 31.....	Cash Discount Act.....	July 31, 1981.....	Intra adj. ¹	Pocket.....	P.L. 97-25.
4	S. 694.....	Department of Defense, Supplemental Authorization Act.	Aug. 5, 1981.....	Intra adj. ¹	Pocket.....	P.L. 97-39.
5	H.R. 4242.....	Economic Recovery Tax Act.....	Aug. 12, 1981.....	Intra adj. ¹	Pocket.....	P.L. 97-34.
6	H.R. 3982.....	Reconciliation Act, Omnibus.....	Aug. 12, 1981.....	Intra adj. ¹	Pocket.....	P.L. 97-35.
7	H.J. Res. 325..	Continuing Appropriations.....	Oct. 1, 1981.....	Intra adj. ⁷	Pocket.....	P.L. 97-51.
8	S. 304.....	National Tourism Policy Act.....	Oct. 5, 1981.....	In session.....	No.....	P.L. 97-63.
9	S. 1181.....	Uniformed Services Pay Act.....	Oct. 14, 1981.....	In session.....	No.....	P.L. 97-60.
10	S. 815.....	Defense Department Authorization Act.	Nov. 19, 1981.....	In session.....	No.....	P.L. 97-86.
11	H.R. 4144.....	Energy and Water Development Appropriations.	Nov. 23, 1981.....	1 House recess.....	No.....	P.L. 97-88.
12	H.R. 3454.....	Intelligence Authorization Act.....	Nov. 23, 1981.....	1 House recess.....	No.....	P.L. 97-89.

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No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
13	H.R. 3413.....	Department of Energy National Security and Military Applications of Nuclear Energy Authorization.	Nov. 23, 1981.....	1 House recess.....	No.....	P.L. 97-90.
14	H.R. 4522.....	District of Columbia Appropriations.	Nov. 23, 1981.....	1 House recess.....	No.....	P.L. 97-91.
15	H.J. Res. 357..	Appropriations, Continuing, Further.	Nov. 23, 1981.....	1 House recess.....	No.....	Return Vetoed.
16	S. 1098.....	NASA Authorization.....	Dec. 10, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-96.
17	H.R. 3455.....	Military Construction Authorization.	Dec. 11, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-99.
18	H.R. 4035.....	Interior and Related Agencies Appropriations.	Dec. 11, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-100.
19	H.R. 4034.....	Housing and Urban Development—Independent Agencies Appropriations.	Dec. 11, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-101.
20	H.R. 4209.....	Transportation and Related Agencies Appropriations.	Dec. 16, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-102.
21	H.R. 4119.....	Agriculture, Rural Development and Related Agencies Appropriations.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-103.
22	H.R. 4241.....	Military Construction Appropriations.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-106.
23	S. 1086.....	Order Americans Act Amendments.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-115.
24	H.R. 4503.....	Water Pollution Control Act Amendments.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-117.

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ADDENDUM I: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO—

Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
25	H.R. 4331.....	Social Security Minimum Benefits.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-123.
26	S. 1211.....	Toxic Substance Control Act Extension.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-129.
27	H.R. 3567.....	Export Administration Amendments Act.	Dec. 17, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-145.
28	S. 884.....	Agriculture and Food Act.....	Dec. 21, 1981.....	Inter adj. ³	Pocket.....	P.L. 97-98.
29	S. 1196.....	International Security and Development Cooperation Act.	Dec. 22, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-113.
30	H.R. 4995.....	Department of Defense Appropriation Act.	Dec. 22, 1981.....	Inter Adj. ²	Pocket.....	P.L. 97-114.
31	H.R. 4559.....	Foreign Assistance Appropriations.	Dec. 22, 1981.....	Inter adj. ²	Pocket.....	P.L. 97-121.
32	S. 1503.....	Petroleum Allocation Act, Standby.	Mar. 9, 1982.....	Brief recess.....	No.....	Return Vetoed.
33	H.R. 4.....	Intelligence Identities Protection Act.	June 15, 1982.....	Brief recess.....	No.....	P.L. 97-200.
34	H.R. 5922.....	Appropriations, Supplemental, Urgent.	June 24, 1982.....	Intra adj. ³	Pocket.....	Return Vetoed.

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35	H.R. 6685.....	Supplemental Appropriations, Urgent.	July 16, 1982.....	In session.....	No.....	P.L. 97-216.
36	S. 2332.....	Energy, Emergency Preparedness Act, National.	Aug. 2, 1982.....	In session.....	No.....	P.L. 97-229.
37	S. 1193.....	International Communication Agency and Board for International Broadcasting Appropriations, Authorization.	Aug. 12, 1982.....	Intra adj. ⁴	Pocket.....	P.L. 97-241.
38	H.R. 6530.....	Mount St. Helens National Volcanic Area, Establish.	Aug. 20, 1982.....	Intra adj. ⁴	Pocket.....	P.L. 97-243.
39	H.R. 6863.....	Supplemental Appropriation Act...	Aug. 23, 1982.....	Intra adj. ⁴	Pocket.....	Return Vetoed
40	S. 2248.....	Department of Defense Authorization Act.	Aug. 27, 1982.....	In session.....	No.....	Overridden, P.L. 97-257.
41	H.R. 6955.....	Omnibus Budget Reconciliation Act.	Aug. 27, 1982.....	In session.....	No.....	P.L. 97-252.
42	H.R. 4961.....	Miscellaneous Revenue Act.....	Sept. 2, 1982.....	In session.....	No.....	P.L. 97-253.
43	H.R. 3239.....	Federal Communications Commission Authorization Act.	Sept. 2, 1982.....	In session.....	No.....	P.L. 97-248.
44	H.R. 3663.....	Bus Regulatory Act.....	Sept. 8, 1982.....	In session.....	No.....	P.L. 97-259.
45	S. 923.....	Pre-Trial Services Act.....	Sept. 16, 1982.....	In session.....	No.....	P.L. 97-261.
46	H.R. 6068.....	Intelligence Authorization Act.....	Sept. 16, 1982.....	In session.....	No.....	P.L. 97-267.
47	H.R. 6956.....	Housing and Urban Development-Independent Agencies Appropriations.	Sept. 30, 1982.....	Intra adj. ⁵	Pocket.....	P.L. 97-269.

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ADDENDUM I: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO—

Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
48	S. 1409	Buffalo Bill Dam and Reservoir Enlargement in Wyoming.	Oct. 1, 1982	Intra adj. ⁵	Pocket	P.L. 97-293
49	S. 2852	Sallie Mae Technical Amendments Act.	Oct. 1, 1982	Intra adj. ⁵	Pocket	P.L. 97-301.
50	H.R. 6133	Endangered Species Act Amendments.	Oct. 1, 1982	Intra adj. ⁵	Pocket	P.L. 97-304.
51	H.J. Res. 599	Continuing Appropriations	Oct. 2, 1982	Intra adj. ⁵	Pocket	P.L. 97-276.
52	H.R. 5930	Aviation Insurance Program Extension.	Oct. 2, 1982	Intra adj. ⁵	Pocket	P.L. 97-309.
53	H.R. 6976	Missing Children Act	Oct. 4, 1982	Intra adj. ⁵	Pocket	P.L. 97-292.
54	S. 2586	Military Construction Authorization Act.	Oct. 4, 1982	Intra adj. ⁵	Pocket	P.L. 97-321
55	H.R. 6968	Military Construction Appropriations.	Oct. 4, 1982	Intra adj. ⁵	Pocket	P.L. 97-323.
56	S. 734	Export Trade Services	Oct. 5, 1982	Intra adj. ⁵	Pocket	P.L. 97-290.
57	S. 2036	Job Training Partnership Act	Oct. 5, 1982	Intra adj. ⁵	Pocket	P.L. 97-300.
58	H.R. 5890	NASA Authorization Act	Oct. 5, 1982	Intra adj. ⁵	Pocket	P.L. 97-324.
59	S. 2457	District of Columbia Federal Payment Increase.	Oct. 5, 1982	Intra adj. ⁵	Pocket	P.L. 97-334.

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60	S. 1018	Coastal Barrier Resources Act	Oct. 12, 1982	Intra adj. ⁵	Pocket	P.L. 97-348
61	H.R. 6267	Depository Institutions Amendments.	Oct. 13, 1982	Intra adj. ⁵	Pocket	P.L. 97-320.
62	H.R. 4717	Taxes, LIFO Recapture Effective Date.	Oct. 13, 1982	Intra adj. ⁵	Pocket	P.L. 97-362.
63	H.R. 4441	Copyright Office in the Library of Congress, Fees Submitted to, With Respect To.	Oct. 13, 1982	Intra adj. ⁵	Pocket	P.L. 97-366
64	H.R. 7019	Transportation and Related Agencies Appropriations.	Dec. 17, 1982	Final adj. ⁶	Pocket	P.L. 97-369.
65	H.R. 7072	Agriculture, Rural Development and Related Agencies Appropriations.	Dec. 17, 1982	Final adj. ⁶	Pocket	P.L. 97-370.
66	H.J. Res. 631	Continuing Appropriations, Further.	Dec. 20, 1982	Final adj. ⁶	Pocket	P.L. 97-377.
67	H.R. 7144	District of Columbia Appropriations.	Dec. 21, 1982	Final adj. ⁶	Pocket	P.L. 97-378.
68	H.R. 6946	False Identification Crime Control Act.	Dec. 21, 1982	Final adj. ⁶	Pocket	P.L. 97-398.
69	S. 2623	Indians, Tribally Controlled Community College Act Extension.	Dec. 22, 1982	Final adj. ⁶	Pocket	Pocket Vetoed.
70	H.R. 7356	Interior and Related Agencies Appropriations.	Dec. 23, 1982	Final adj. ⁶	Pocket	P.L. 97-394.
71	H.R. 5238	Orphan Drug Act	Dec. 23, 1982	Final adj. ⁶	Pocket	P.L. 97-414.
72	H.R. 2330	Nuclear Regulatory Commission Authorization.	Dec. 23, 1982	Final adj. ⁶	Pocket	P.L. 97-415.

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ADDENDUM I: MAJOR BILLS OF THE 97th CONGRESS: POCKET VETO OR RETURN VETO— Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
73	H.R. 6211.....	Surface Transportation Assistance Act.	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-424.
74	H.R. 5447.....	Futures Trading Act.....	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-444.
75	H.R. 4566.....	Tariff Schedules Amendments.....	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-446.
76	H.R. 6056.....	Technical Corrections Act.....	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-448.
77	H.R. 5002.....	Fishery Conservation and Management Improvement.	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-453.
78	H.R. 7093.....	Virgin Islands Taxes Revision.....	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-455.
79	H.R. 6094.....	U.S. International Trade Commission, U.S. Customs Service, U.S. Trade Representative Authorization.	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-456.
80	H.R. 3420.....	Pipeline Safety Authorization Act..	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-468.
81	H.R. 5470.....	Periodic Payment Settlement Act..	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	P.L. 97-473.
82	H.R. 3963.....	Contract Services for Drug Dependent Federal Offenders Act Amendments.	Jan. 3, 1983.....	Final adj. ⁶	Pocket.....	Pocket Vetoed.

This chart analyzes the bills listed in the 97th Congress's final House Calendar section on Bills Through Conference. In the column, "Status of Congress Ten Days After Presentation," "in session" means the originating House of the bill was in session ten days after presentation (Sundays excluded), regardless of the status of the nonoriginating House; "one house recess" means the originating House was in recess while the nonoriginating House was in session; "brief recess" means both Houses were in recess for three days or less, so that no adjournment resolution was necessary; "intra adj." means an intrasession adjournment; "inter adj." means the intersession adjournment; "final adj." means the final adjournment.

In the column, "Subject to Pocket Veto," "pocket" means that ten days after presentation Congress was in an intrasession, intersession, or final adjournment. Several bills labeled "pocket" were return vetoed, either because the President return vetoed them before the end of ten days, or because the President returned them despite Congress being in adjournment.

The dates of adjournment, stated below in the footnotes, were from 1983-84 Congressional Directory at 423, 425. The House and Senate status when not governed by adjournment resolution (in session, 1 House recess, or brief recess) is from House and Senate Calendars.

¹ S. Con. Res. 27 provided for adjournment of the House Aug. 4 to Sept. 9, 1981, and of the Senate Aug. 3 to Sept. 9, 1981.

² S. Con. Res. 57 provided for *sine die* adjournment of the Congress Dec. 16, 1981.

³ H. Con. Res. 367 provided for adjournment of the House any day between June 28 and July 2, 1982 to July 12, 1982, and of the Senate July 1 or July 2, 1982 to July 12, 1982. Pursuant to it, the House was in recess July 1 to July 12, 1982, and the Senate was in recess July 1 to July 12, 1982.

⁴ H. Con. Res. 399 provided for adjournment of the House Aug. 20 to Sept. 8, 1982, and of the Senate Aug. 19, Aug. 20, or Aug. 21 to Sept. 8, 1982. Pursuant to it, the Senate was in recess Aug. 20 to Sept. 8, 1982.

⁵ H. Con. Res. 421 provided for adjournment of Congress Oct. 1 or Oct. 2, 1982 to Nov. 29, 1982. Pursuant to it, Congress was in recess Oct. 1 to Nov. 29, 1982.

⁶ H. Con. Res. 438 provided for *sine die* adjournment of the House Dec. 20 or Dec. 21, 1982, and of the Senate anytime before Jan. 3, 1983. Pursuant to it, Congress adjourned Dec. 23, 1982.

⁷ H. Con. Res. 201 provided for adjournment of the House Oct. 7 to Oct. 13, 1981, and of the Senate Oct. 7 to Oct. 14, 1981.

ADDENDUM II: MAJOR BILLS OF THE 98th CONGRESS: POCKET VETO OR RETURN VETO

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
1	H.R. 1718.....	Emergency Appropriations, 1983....	Mar. 24, 1983	In session.....	No	P.L. 98-8.
2	H.R. 1900.....	Social Security Act Amendments of 1983.	Apr. 12, 1983.....	Brief recess	No	P.L. 98-21.
3	H.R. 3133.....	Housing and Urban Development—Independent Agencies Appropriation, 1984.	July 1, 1983	In session.....	No	P.L. 98-45.
4	H.R. 3132.....	Energy and Water Development Appropriation, 1984.	July 5, 1983	Brief recess	No	P.L. 98-50.
5	H.R. 3392.....	Freeze tobacco support for 1983 crop at 1982 level.	July 20, 1983.....	In session.....	No	P.L. 98-59.
6	H.R. 3135.....	Legislative Branch Appropriations, 1984.	July 5, 1983	Brief recess	No	P.L. 98-51.
7	S. 273	Minority Small Business Pilot Procurement Act of 1983.	July 1, 1983.....	In session.....	No	P.L. 98-47.
8	H.R. 2973.....	Interest and Dividends tax withholding repeal.	Aug. 3, 1983	Inter adj. ¹	Pocket	P.L. 98-67.
9	H.R. 3069.....	Supplemental Appropriations, 1983.	July 29, 1983.....	Inter adj. ¹	Pocket	P.L. 98-63.

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10	S. 272	Small business access to Federal procurement information, approve.	Aug. 2, 1983	Inter adj. ¹	Pocket	P.L. 98-72.
11	H.R. 3329.....	Transportation and Related Agencies Appropriations, 1984.	Aug. 5, 1983	Inter adj. ¹	Pocket	P.L. 98-78.
12	S. 675	Department of Defense, Fiscal Year 1984, Authorization.	Sept. 19, 1983.....	In session.....	No	P.L. 98-94.
13	H.R. 2972.....	Military Construction Authorization, Fiscal Year 1984.	Sept. 28, 1983.....	Brief recess	No	P.L. 98-115.
14	H.R. 3263.....	Military Construction Appropriation, 1984.	Sept. 29, 1983.....	Brief recess	No	P.L. 98-116.
15	H.R. 3415.....	District of Columbia Appropriation, 1984.	Oct. 1, 1983	Brief recess	No	P.L. 98-125.
16	H.J. Res. 368..	Continuing Appropriations, 1984....	Oct. 1, 1983	Brief recess	No	P.L. 98-107.
17	H.R. 3363.....	Interior and Related Agencies Appropriations, 1984.	Oct. 25, 1983	Brief recess	No	P.L. 98-146.
18	H.R. 3913.....	Labor, Health and Human Services and Education Appropriations, 1984.	Oct. 27, 1983	In session.....	No	P.L. 98-139.
19	H.R. 3929.....	Extend Federal Supplemental Compensation Act of 1982.	Oct. 24, 1983	In session.....	No	P.L. 98-135.
20	H.J. Res. 413..	Continuing Appropriations, 1984....	Nov. 14, 1983	Final adj. ²	Pocket	P.L. 98-151.
21	H.R. 3222.....	Commerce, Justice, and State Appropriations, 1984.	Nov. 17, 1983	Final adj. ²	Pocket	P.L. 98-166.
22	H.J. Res. 308..	Debt Limit, Public, Temporary increase in, provide.	Nov. 18, 1983	Final adj. ²	Pocket	P.L. 98-161.

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ADDENDUM II: MAJOR BILLS OF THE 98th CONGRESS: POCKET VETO OR RETURN VETO—
Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
23	H.R. 3959.....	Supplemental Appropriations, 1984.	Nov. 29, 1983	Final adj. ²	Pocket	P.L. 98-181.
24	H.R. 3385.....	Cotton Producers, Payment-in-kind Program.	Nov. 22, 1983	Final adj. ²	Pocket	P.L. 98-180.
25	H.R. 4185.....	Defense Appropriations, 1984.....	Nov. 29, 1983	Final adj. ²	Pocket	P.L. 98-212.
26	H.R. 2780.....	State and Local Fiscal Assistance Amendments of 1983.	Nov. 18, 1983	Final adj. ²	Pocket	P.L. 98-185.
27	S. 726	Tribally Controlled Community College Assistance Act of 1978.	Nov. 21, 1983	Final adj. ²	Pocket	P.L. 98-192.
28	H.R. 1035.....	Education Consolidation and Improvement Act of 1981.	Nov. 29, 1983	Final adj. ²	Pocket	P.L. 98-211.
29	H.R. 2915.....	State Department and Related Agencies Act, Authorizations.	Nov. 22, 1983	Final adj. ²	Pocket	P.L. 98-164.
30	H.R. 2906.....	Arms Control and Disarmament Act, Authorization.	Nov. 23, 1983	Final adj. ²	Pocket	P.L. 98-202.
31	H.R. 2968.....	Intelligence Authorization Act, 1984.	Nov. 29, 1983	Final adj. ²	Pocket	P.L. 98-215.
32	H.R. 2077.....	Physicians Comparability Allowance Amendments, 1983.	Nov. 17, 1983	Final adj. ²	Pocket	P.L. 98-168.

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33	S. 1340	Rehabilitation Act of 1973 and Developmental Disability Assistance and Bill of Rights Act, extend.	Feb. 10, 1984	In session.....	No	P.L. 98-221.
34	S. 47	Shipping Act of 1983	Mar. 8, 1984	In session.....	No	P.L. 98-237.
35	H.R. 4194.....	Energy Policy and Conservation Act.	Mar. 20, 1984	Brief recess	No	P.L. 98-239.
36	H.J. Res. 493..	Health and Human Services, Urgent Supplemental Appropriations for 1984.	Mar. 29, 1984	In session.....	No	P.L. 98-248
37	H.R. 4072.....	Wheat Improvement Act of 1983	Apr. 5, 1984.....	Intra adj. ³	Pocket	P.L. 98-258.
38	S. 1852	Defense Production Act of 1950, extend.	Apr. 12, 1984.....	In session.....	No	P.L. 98-265.
39	S. 64	Irish Wilderness Act of 1983.....	May 9, 1984.....	In session.....	No	P.L. 98-289.
40	S. 1129	Domestic Volunteer Service Act of 1984.	May 10, 1984.....	In session.....	No	P.L. 98-288.
41	H.R. 5692.....	Debt Limit Extension	May 25, 1984.....	In session.....	No	P.L. 98-302.
42	H.J. Res. 492..	Supplemental Appropriations, Agriculture, 1984.	June 27, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-332.
43	H.R. 4170.....	Tax Reform Act.....	July 6, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-369.
44	H.R. 5653.....	Energy and Water Development Appropriation, 1985.	July 6, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-360.
45	H.R. 5713.....	Housing and Urban Development Independent Agencies Appropriations, 1985.	July 6, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-371.
46	H.R. 5154.....	NASA Authorization Act, 1985	July 6, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-361.

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ADDENDUM II: MAJOR BILLS OF THE 98th CONGRESS: POCKET VETO OR RETURN VETO—

Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
47	H.R. 5753.....	Legislative Branch Appropriation, 1985.	July 6, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-367.
48	H.R. 5174.....	Bankruptcy Amendments of 1984...	July 6, 1984.....	Intra adj. ⁴	Pocket	P.L. 98-353.
49	H.R. 1492.....	Columbus Quincentenary Jubilee Act.	Aug. 3, 1984	Intra adj. ⁵	Pocket	P.L. 98-375.
50	S. 1429	Small Business Development Center Programs.	Aug. 9, 1984	Intra adj. ⁵	Pocket	P.L. 98-395.
51	H.R. 4325.....	Child Support Enforcement Amendments of 1983.	Aug. 10, 1984	Intra adj. ⁵	Pocket	P.L. 98-378.
52	H.R. 5604.....	Military Construction Authorization Act, 1985.	Aug. 20, 1984	Intra adj. ⁵	Pocket	P.L. 98-407.
53	H.R. 5712.....	Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations, 1985.	Aug. 20, 1984	Intra adj. ⁵	Pocket	P.L. 98-411.
54	H.R. 6040.....	Supplemental Appropriations, Second, 1984.	Aug. 20, 1984	Intra adj. ⁵	Pocket	P.L. 98-396.
55	H.R. 3755.....	Social Security Disability Benefits Reform Act.	Sept. 27, 1984.....	In session.....	No	P.L. 98-460.

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56	S. 38	Longshoreman's and Harbor Worker's Compensation Act.	Sept. 26, 1984.....	Brief recess	No	P.L. 98-426.
57	H.R. 5297	Civil Aeronautics Board Sunset Act, 1984.	Sept. 26, 1984.....	Brief recess	No	P.L. 98-443.
58	S. 2603	Older Americans Act of 1965, appropriations, authorization for, extend.	Oct. 1, 1984	In session.....	No	P.L. 98-459.
59	H.R. 5167.....	Defense Authorization Act, 1985, Department of.	Oct. 12, 1984	Final adj. ⁶	Pocket	P.L. 98-525.
60	H.R. 1904.....	Child Abuse Amendments of 1984..	Oct. 2, 1984	Final adj. ⁶	Pocket	P.L. 98-457.
61	S. 1841	Productivity and Innovation Act of 1983, National.	Oct. 3, 1984	Final adj. ⁶	Pocket	P.L. 98-462.
62	S. 1097	Satellite Program Authorization Act.	Oct. 9, 1984	Final adj. ⁶	Pocket	Pocket Vetoed.
63	H.R. 2878.....	Library Services and Construction Act Amendments of 1983.	Oct. 5, 1984	Final adj. ⁶	Pocket	P.L. 98-480.
64	S. 2819	Housing and Urban-Rural Recovery Act of 1983, correction to.	Oct. 5, 1984	Final adj. ⁶	Pocket	P.L. 98-479.
65	S. 1146	Aviation Drug Trafficking Control Act.	Oct. 9, 1984	Final adj. ⁶	Pocket	P.L. 98-499.
66	S. 2303	Alcohol and Drug Abuse and Mental Health Services Block Grant, revise and extend.	Oct. 10, 1984	Final adj. ⁶	Pocket	P.L. 98-509.
67	S. 905	"Archives and Records Administration Act of 1983, National".	Oct. 9, 1984	Final adj. ⁶	Pocket	P.L. 98-497.
68	S. 2496	Adult Education Act Amendments of 1984.	Oct. 10, 1984	Final adj. ⁶	Pocket	P.L. 98-511.

ADDENDUM II: MAJOR BILLS OF THE 98th CONGRESS: POCKET VETO OR RETURN VETO—

Continued

No.	Bill No.	Name	Date of presentation	Status of Congress 10 days after presentation	Subject to pocket veto	Actual fate
69	S. 2166	Indian Health Care Amendments of 1984.	Oct. 10, 1984	Final adj. ⁶	Pocket	Pocket Vetoed. P.L. 98-524.
70	H.R. 4164	Vocational Technical Education Act, 1984.	Oct. 12, 1984	Final adj. ⁶	Pocket	P.L. 98-507.
71	S. 2048	Organ Procurement and Transplantation Act.	Oct. 10, 1984	Final adj. ⁶	Pocket	P.L. 98-527.
72	H.R. 5603	Alcohol and Drug Abuse and Mental Health Amendments of 1984.	Oct. 12, 1984	Final adj. ⁶	Pocket	Pocket Vetoed.
73	S. 540	Arthritis and Musculoskeletal and Skin Diseases, National Institute of, Establish.	Oct. 19, 1984	Final adj. ⁶	Pocket	P.L. 98-501.
74	S. 1330	Public Capital Investment Act of 1983.	Oct. 10, 1984	Final adj. ⁶	Pocket	P.L. 98-616.
75	H.R. 2867	Hazardous Waste Control and Enforcement Act of 1983.	Oct. 29, 1984	Final adj. ⁶	Pocket	P.L. 98-512.
76	S. 2616	Adolescent Family Life Demonstration Program.	Oct. 12, 1984	Final adj. ⁶	Pocket	

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77	S. 2574	Nurse Education Amendments of 1984.	Oct. 19, 1984	Final adj. ⁶	Pocket	Pocket Vetoed.
78	H.R. 3398	Tariff treatment with respect to certain articles, change.	Oct. 29, 1984	Final adj. ⁶	Pocket	P.L. 98-573.
79	H.R. 6028	Appropriations, Labor, Health and Human Services, and Education, 1985.	Oct. 29, 1984	Final adj. ⁶	Pocket	P.L. 98-619.
80	H.J. Res. 648	Continuing Appropriations, 1985	Oct. 12, 1984	Final adj. ⁶	Pocket	P.L. 98-473.
81	S. 66	Cable Telecommunications Act of 1983.	Oct. 19, 1984	Final adj. ⁶	Pocket	P.L. 98-549.
82	H.R. 6027	Local Government Antitrust Act of 1984.	Oct. 19, 1984	Final adj. ⁶	Pocket	P.L. 98-544.
83	H.R. 4209	Small Business Administration break-out procurement center representatives, provide.	Oct. 19, 1984	Final adj. ⁶	Pocket	P.L. 98-577.

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This chart analyzes the bills listed in the 98th Congress's final House Calendar section on Bills Through Conference. In the column, "Status of Congress Ten Days After Presentation," "in session" means the originating House of the bill was in session ten days after presentation (Sundays excluded), regardless of the status of the nonoriginating House; "brief recess" means both Houses were in recess for three days or less, so that no adjournment resolution was necessary; "intra adj." means an intrasession adjournment; "inter adj." means the intersession adjournment; "final adj." means the final adjournment.

In column, "Subject to Pocket Veto," "pocket" means that ten days after presentation Congress was in an intrasession, intersession, or final adjournment. Several bills labeled "pocket" were returned vetoed, either because the President return vetoed them before the end of ten days, or because the President returned them despite Congress being in adjournment.

The dates of adjournment, stated below in the footnotes, were from 1985-86 *Congressional Directory* at 426-427. The House and Senate status when not governed by adjournment resolution (in session, or brief recess) is from House and Senate Calendars.

¹ H. Con. Res. 153 provided for adjournment of the House Aug. 4 or Aug. 5, 1983 to Sept. 12, 1983, and of the Senate Aug. 3, Aug. 4, or Aug. 5 to Sept. 12, 1983.

² H. Con. Res. 221 provided for *sine die* adjournment of the Congress Nov. 17, Nov. 18, or Nov. 19, 1983.

³ S. Con. Res. 103 provided for adjournment of the House April 12 or April 13, 1984 to April 24, 1984 and of the Senate April 11, April 12, or April 13 to April 24, 1984.

⁴ H. Con. Res. 334 provided for adjournment of the House June 29, 1984 to July 23, 1984 and of the Senate June 29 or June 30, 1984 to July 23, 1984.

⁵ H. Con. Res. 351 provided for adjournment of Congress Aug. 10, 1984 to Sept. 5, 1984.

⁶ H. Con. Res. 377 provided for *sine die* adjournment of the House Oct. 11 or Oct. 12, 1984. S. Con. Res. 155 provided for *sine die* adjournment of the Senate Oct. 12-18 or 19, 1984.

(11)
No. 85-781

FILED

OCT 28 1986

JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

FRANK G. BURKE, ACTING ARCHIVIST OF THE
UNITED STATES AND RONALD GEISLER, EXECUTIVE
CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE
UNITED STATES AND RONALD GEISLER, EXECUTIVE
CLERK OF THE WHITE HOUSE, PETITIONERS

v.

MICHAEL D. BARNES, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents — the United States Senate and Members of the House of Representatives — seek a judicial declaration that H.R. 4042 became a law under Art. I, § 7, Cl. 2 of the Constitution when the President did not return it to the House of Representatives within ten days (Sundays excepted) of its presentment to him. However, before that ten-day period expired (and in fact on the very day the bill was presented to the President), Congress adjourned the First Session of the 98th Congress sine die, thereby preventing the President from returning the bill to the House of Representatives for reconsideration. To assure that a bill will not remain in limbo in those circumstances if the President does not sign it, the Constitution terminates the legislative process with respect to the bill by specifying that “it shall not be a Law.” The Court unanimously so held in *The Pocket Veto Case*, 279 U.S. 655 (1929), drawing support for its holding from the unbroken practice under the Constitution since the Administration of James Madison.

Respondents point to no new evidence suggesting that this Court in *The Pocket Veto Case* and the 25 Presidents who

treated such bills as having failed of enactment erred in their understanding of the clear rule prescribed by the Framers to govern the situation in which Congress has adjourned prior to completion of the time allotted for the legislative process. Respondents' argument instead derives almost entirely from *Wright v. United States*, 302 U.S. 583 (1938). But *Wright* involved wholly different circumstances—an actual return of the bill by the President during a brief three-day recess by only one House—and the Court in *Wright* in fact unanimously declined to disturb the holding of *The Pocket Veto Case*. The Court should again decline to do so here.

The reasons for rejecting respondents' invitation go beyond these considerations on the merits. Respondents urge this Court to overrule *The Pocket Veto Case* in the context of an abstract disagreement over the meaning of a constitutional provision, with nothing concrete turning on the outcome: respondents lack standing to obtain such a declaration because they do not claim that they would have any rights under H.R. 4042 if it did become a law, and the controversy regarding the status of H.R. 4042 is now moot in any event because the bill's expiration date has passed. Respondents strain to overcome both mootness and their lack of standing by arguing that their votes and roles in the legislative process have been "nullified" by the failure of the Archivist at least to receive the bill from the President and to publish it as a law. This argument is without merit. The question whether H.R. 4042 became a law is answered by the Constitution itself, and the operative constitutional rule is unaffected by whether or not the bill has been received and published by the Archivist. For this reason, petitioners could not have "nullified" respondents' votes and legislative roles—and therefore could not have been the cause of the amorphous injury respondents allege—even if H.R. 4042 did become a law. Furthermore, as representatives of the Legislative Branch, respondents have no standing to sue an Executive Branch official to resolve a dispute regarding the latter's execution of the law, including the bill-publication statute.

Especially with no legal rights at stake and no statutory basis for the suit, the Court should reject this effort by representatives of the Legislative Branch to obtain from the Judiciary

what would amount to nothing more than an advisory opinion regarding the application of the lawmaking procedures in Article I, Section 7. We shall first address these interrelated questions of standing and mootness.

A.

Respondents cite no decision of this Court in the nearly 200 years since the institution of the Government under the Constitution that sanctions a suit such as this—a suit brought by Members and one House of the Legislative Branch against an officer of the Executive Branch to resolve a legal disagreement concerning the Executive officer's performance of his official responsibilities. Respondents apparently recognize the implications of their position, because they make little effort to defend the notion that individual Members of Congress have standing, except perhaps in narrow circumstances (H.R. Br. 15-19, 20-21, 25; Sen.-Barnes Br. 21-22 & n.13; see Gov't Br. 22, 24), or that representatives of the Legislative Branch have standing to sue an Executive official to challenge the manner in which he executes the law (H.R. Br. 23-26; Sen.-Barnes Br. 17-19). Respondents argue, however, that this case is different because what they challenge is petitioners' "nullification" of their votes in the legislative process. That argument fails, both on standing and mootness grounds.

1. Contrary to respondents' broad theme regarding the compatibility of congressional standing in this case with the doctrine of separation of powers (H.R. Br. 14-15, 25-26; Sen.-Barnes Br. 15-17), the Court's recent decision in *Bowsher v. Synar*, No. 85-1377 (July 7, 1986), confirms our submission (Gov't Br. 13-20) that recognition of a right in respondents to bring this action would conflict with the constitutional role of both the Judiciary and Congress under the Constitution.

a. It was established early in the Nation's history that the separation of powers under the Constitution and the nature of the "judicial Power" conferred by Article III do not contemplate that the Judiciary may be called upon to render an advisory opinion to one of the political Branches concerning its official duties, when no adverse parties are before the Court and no legal rights are to be vindicated. Correspondence of the

Justices, reprinted in 3^d *Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891); *Muskrat v. United States*, 219 U.S. 346, 354 (1911). The Justices' declination of that request by the President, the wisdom of which has never been doubted, underscores the need to maintain the autonomy, sense of responsibility, and distinctive mode of decision-making of the respective Branches, as well as to avoid too close an association of the Court with the interests of another Branch.¹ These concerns are heightened where, as here, members of one of the political Branches request the Court to render an opinion regarding the actions of officials of the *other* political Branch, for then the Judiciary would be required to step between them to address what would almost inevitably partake of a dispute of the sort that the Constitution leaves for resolution by other means.²

The premise that such inter-Branch disputes not involving private parties are committed elsewhere for resolution is woven throughout the fabric of the Constitution. It is reflected first in the underlying principle that both the Members of Congress and the President are the elected representatives of the people in the operation of the Government. See *INS v. Chadha*, 462 U.S. 919, 948 (1983); *Synar*, slip op. 6; Art. I, §§ 2, 3; Art. II, § 1; Amend. XVII. The plan of the Framers to trust the internal operation of government to the sometimes imperfect process of interplay and compromise of these separate representative components (*Chadha*, 462 U.S. at 958-959) would be frustrated if the members of either could routinely submit their differences to arbitration by the unelected Third Branch. *Valley*

¹ Thus, the Court could not respond to a request from either the President or Congress (or a House or Members thereof) for an opinion as to whether H.R. 4042 became a law that must be implemented by the Executive. Nor could the Court do so if the President and Congress jointly requested such an opinion. The result should be no different in this case merely because respondents have made a unilateral request and put it in the *form* of a conventional lawsuit. However styled, this is not a "Case" or "Controversy" within the contemplation of the Constitution.

² For example, this suit was initiated by 33 Members of Congress who sought, on an expedited basis, to have the courts endorse their view that military aid to El Salvador must be terminated unless the President made a timely certification to Congress of progress on certain human rights matters — scarcely a familiar subject or context for judicial review.

Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 473-474 (1982).

That this was not the intent also is demonstrated by the numerous provisions of the Constitution that provide for the political Branches to address each other *directly* in the governance of the Nation. Thus, the President is instructed to "give to the Congress Information of the State of the Union," and to "recommend to their Consideration such Measures as he shall judge necessary and expedient." Art. II, § 3. Correspondingly, when the two Houses of Congress pass a bill, it is "presented" to the President for review; if the President disapproves the bill, he must return it to the originating House "with his Objections," and those objections are to be entered on the Journal, reconsidered, and perhaps overridden by a two-thirds vote. Art. I, § 7, Cl. 2. The President also submits treaties and nominations to the Senate, seeking its "Advice and Consent." Art. II, § 2, cl. 2; see also Amend. XXV, § 2. And although Congress ordinarily is autonomous with respect to its meetings, the President may convene Congress or either of its Houses on "extraordinary Occasions" and adjourn them to an appropriate time when the two Houses are in disagreement. Art. II, § 3. Finally, the President and other civil officers are subject to impeachment by the House and conviction by the Senate, sitting as a court of impeachment, but only for "Treason, Bribery, or other high Crimes and Misdemeanors." Art. II, § 4; see also Amend. XXV, §§ 3, 4.

Notably absent from these prescribed means of official relation and communication between the political Branches is any mechanism for invoking judicial resolution of disputes. This structure strongly implies that disagreements that arise out of the formal intercourse between Congress and the Executive that is provided for in the Constitution — such as the dispute in this case arising out of the lawmaking procedures under Article I, Section 7 — were intended to be resolved by the on-going process of political interaction between them, except when the courts are required to resolve the issue in the course of deciding an ordinary case or controversy. Compare *Chadha*, 462 U.S. at 935-936; see also *Allen v. Wright*, 468 U.S. 737, 752 (citation omitted) (1984) ("federal courts may exercise power only 'in the

last resort, and as a necessity' "). Indeed, as we have pointed out in our opening brief (at 16 n.10, 19 n.13), the Constitutional Convention specifically rejected proposals to involve the Judiciary in the impeachment process and in a Council of Revision to review bills passed by Congress.³ The text and background of the Constitution thus bespeak an intent to keep the Judiciary from playing an active role in the political interaction of the other two Branches of the Federal Government.

b. The considerations that render the Judicial Branch an inappropriate forum to entertain respondents' claims in this case are reinforced by corresponding limitations that are placed on the role of Congress under the Constitution and that withhold from it the power to invoke the Judiciary to resolve a disagreement with the Executive. The Court's observations in *Chadha*, recently reiterated in *Synar* (slip op. 10-11), are particularly pertinent here (462 U.S. at 954-955):

Disagreement with the Attorney General's decision on Chadha's deportation * * * no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.

Under *Chadha* and *Synar*, then, Congress's "disagreement" with

³ Respondents argue that the rejection of the Council of Revision is irrelevant because the objection was to involving judges in considering the wisdom of legislation when they would also consider its constitutionality. See Sen.-Barnes Br. 26 n.17, quoting 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 97-98 (1966). Respondents miss the point. Those considering the proposal contemplated that the judges would pass upon the constitutionality of the law in their traditional judicial role only later, "as it should come before them" (*id.* at 98; see also *id.* at 138; 2 *id.* at 75, 76, 78), and that "Judges ought never to give their opinion on a law till it comes before them" (*id.* at 80). It would be inconsistent with the judicial role the Framers envisaged to recognize in this case a right in Congress or its Houses or Members to obtain an immediate and admonitory opinion from the Judiciary regarding the efficacy of a bill presented to the President, rather than to postpone that question until an occasion might arise for the courts to perform their traditional and more detached role of expounding the law in a case involving private interests that are actually affected by the law.

the various Executive decisions with which respondents have taken issue—the President's decision not to regard H.R. 4042 as a law, the resulting administration of the appropriation statutes for El Salvador without application of the certification conditions in H.R. 4042, the President's (Executive Clerk's) failure to deliver the bill to the Archivist, and the latter's failure to publish it—can be "implement[ed] in only one way," through the enactment of a new law that prescribes Congress's substantive position. Because Congress may affect the "legal rights, duties, and relations of persons [outside the Legislative Branch], including * * * Executive Branch officials," only by making a law in the manner prescribed by Art. I, § 7 (*Chadha*, 462 U.S. at 952), it is only such legislative action that can accomplish respondents' stated purpose of affecting the duties of Executive officials responsible for bringing about the publication of bills. See also *Synar*, slip op. 18-24 (Stevens, J., concurring in the judgment). Congress—let alone its Houses and Members—cannot make "law" through litigation. Congress's lack of a judicially cognizable interest in the Executive's actions in these circumstances is further demonstrated by the Court's observation in *Synar* that "the President, under Article II, is responsible not to the Congress but to the people" (slip op. 6).

c. The foregoing discussion demonstrates why respondents' extensive reliance (H.R. Br. 8-14, 16; Sen.-Barnes Br. 7-9) on *Coleman v. Miller*, 307 U.S. 433 (1939), is misplaced. There, the Court, over the vigorous dissent of four Justices, held that it had jurisdiction to review the decision of a state court that had decided a federal constitutional question (the right of the Lieutenant Governor to break a tie in the state Senate in the vote to ratify the Child Labor Amendment) in an action brought by state legislators against state defendants. *Coleman* is different from this case in a number of critical respects. First, the Court did not hold that the state legislators could have sued directly in federal court, as respondents have done. See *id.* at 465 (Frankfurter, J., dissenting); Pet. App. 95a-99a (Bork, J., dissenting). Second, the Court in *Coleman* stressed that the legislators' interest was "treated by the state court as a basis for entertaining and deciding the federal questions" and therefore was "sufficient to give the Court jurisdiction to review that

decision" (307 U.S. at 446). Thus, the decision in *Coleman* rested on a determination by the state supreme court that *state* legislators had a sufficient interest in the effectiveness of their votes as a matter of *state* law to permit that interest to be cognizable in *state* court. The standing issue in this case is entirely different: it concerns the interests that are directly cognizable in *federal* court and depends upon the relation of the Branches of the *Federal* Government under the *Federal* Constitution. Compare *Reynolds v. Sims*, 377 U.S. 533, 572-575 (1964); *United States v. Gillock*, 445 U.S. 360, 370 (1980). Finally, the issue in *Coleman* concerned the effectiveness of the legislators' votes under the procedures utilized *within* the legislative branch. Cf. *Bender v. Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 10 n.7. In this case, by contrast, the individual respondents do not contend that their votes were not counted or were not given effect within the Legislative Branch.

2. Against this background, it is not surprising that respondents do not maintain that Congress and its Houses and Members have standing to sue Executive officials as a general matter, especially to resolve disputes over the execution of the laws. Instead, respondents posit what they attempt to portray as a narrower theory: that petitioners, by failing to bring about the publication of H.R. 4042, failed to regard H.R. 4042 as a law, which "nullified" respondents' votes and roles in the legislative process. H.R. Br. 14, 21-26; Sen.-Barnes Br. 6-9, 17-27. But this theory does not avoid the nonjusticiability that respondents essentially concede when Congress or its Members ask the courts to compel the Executive to execute the laws in a particular way.

When this suit initially was filed by the 33 respondent Members of Congress, they plainly sought to vindicate a substantive interest in having the President discontinue aid to El Salvador or follow the certification requirements in H.R. 4042. Consistent with this purpose, respondents sought expedited consideration of this case, so that a decision might be rendered prior to the next certification date of January 16, 1984. Respondents claimed that their votes were "nullified" by the President's failure to comply with the substantive requirements of H.R. 4042. See Gov't Br. 9 & nn. 4, 5.

Respondents apparently no longer rely directly on this theory.

See H.R. Br. 25; Sen.-Barnes Br. 19 n.11. And with good reason. Any supposed "impasse" (H.R. Br. 20; Sen.-Barnes Br. 21) regarding the status of the certification conditions clearly is now moot, because H.R. 4042 would have expired by its own terms more than two years ago even if it did become a law.⁴ Moreover, insofar as respondents' argument once was based on an objection to the failure to implement H.R. 4042, respondents plainly *were* presenting a nonjusticiable claim concerning the execution of the law by the President and his subordinates in the Executive Branch.⁵

Respondents attempt to avoid an order vacating the judgment below on mootness grounds by arguing that they have a right to have this suit continue in order to cause petitioners to bring about the publication of H.R. 4042. However, respondents do

⁴ In arguing against mootness, respondents rely (Sen.-Barnes Br. 35-36) on several statutes that provide for the audit and reporting of expenditures. Respondents argue that whether or not H.R. 4042 became a law might have a bearing on whether covered expenditures were regarded as lawful by the Secretary of State or the Comptroller General and on whether either might make a report on that subject. However, none of these speculations could conceivably be a basis for regarding *this* case as a live controversy. Respondents point to no current dispute regarding such expenditures or reports. Moreover, neither the Secretary of State nor the Comptroller General is a party to this case, and neither petitioners nor respondents herein would be parties to any dispute regarding the legality of expenditures. Compare *Firefighters v. Stotts*, 467 U.S. 561, 569 (1984); *id.* at 585 n.1 (O'Connor, J. concurring); *id.* at 597-598 (Blackmun, J., dissenting); *Oil Workers Union v. Missouri*, 361 U.S. 363, 370-371 (1960). In any event, insofar as respondents object to the expenditure of funds, they necessarily raise a nonjusticiable disagreement with the Executive's administration of the law.

⁵ If the President had concluded that H.R. 4042 became a law but declined to implement it because he concluded that it was *substantively* void under the Constitution, then there of course could be no question that this case would have concerned the execution of the law. The result is no different here merely because the Executive's position was that H.R. 4042 is *procedurally* void. Contrary to the contention by the Senate-Barnes respondents (Br. 19 n.11), it does not matter for these purposes that respondents did not actually name the President as a defendant and seek an injunction requiring him to comply with H.R. 4042. The declaratory judgment they sought was admittedly for the purpose of compelling adherence to the certification requirements in H.R. 4042. The justiciability defect in such a suit brought by Congress or its members cannot be circumvented by artful pleading. Cf. *Heckler v. Ringer*, 466 U.S. 602, 614-616 (1984).

not argue that they have standing to bring an action to compel publication for its own sake. To the contrary, respondents expressly state that they “do not assert that the preservation and publication statutes confer upon them a basis for standing that exists independently of their cognizable interest in vindicating their votes to enact H.R. 4042.” Sen.-Barnes Br. 29; see also *id.* at 31. For the reasons stated in our opening brief (at 28-29 & n.23), it is indeed clear that respondents have no special right of action under the bill preservation and publication statutes. But it is equally clear that they cannot overcome that obstacle on the theory that the Archivist’s failure to publish H.R. 4042 – which occurred because the President did not regard H.R. 4042 as a law and cause it to be delivered to the Archivist – somehow “nullified” their votes and roles in the legislative process.

Respondents’ argument rests in part on the erroneous premise that the failure of a bill under the last Clause of Art. I, § 7, Cl. 2 (the so-called Pocket Veto Clause) is something that the President *does* that affirmatively “nullifies” legislative action. This is inaccurate. A bill fails under that Clause automatically, as a result of the directive that the bill “shall not be a Law.” On the other hand, if the Pocket Veto Clause is inapplicable, as respondents maintain, the bill automatically becomes a law by operation of the directive in the preceding Clause that the bill “shall be a Law” if it is not returned within the ten-day period. Thus, a determination or statement by the President or others in the Executive Branch that a bill has not become a law under the Pocket Veto Clause is simply the expression by them of an opinion regarding the operation of the constitutional mechanism; it is not a formal action of independent significance that could be said to “nullify” respondents’ legislative roles or injure them in a judicially cognizable manner. Respondents’ objection therefore must be that the President acted on his view of the Constitution and accordingly did not carry out the substantive provisions of H.R. 4042. But as we have explained above, any disagreement over the implementation of H.R. 4042 is one concerning the execution of the law, which respondents appear to concede is nonjusticiable in a suit brought by the Legislative Branch, and which is in any event now moot.

Moreover, whether H.R. 4042 was published has no bearing on whether it became a law. If respondents’ view of the Pocket Veto Clause is correct, then H.R. 4042 became a law automatically, and publication can give it no added legal force.⁶ The Archivist’s failure to publish H.R. 4042 therefore in no way “nullified” respondents’ votes or otherwise caused them injury even if they are correct that H.R. 4042 became a law. Indeed, respondents concede that they have no standing to bring an action to require publication for its own sake, and any such suit would be nonjusticiable when brought by the Legislative Branch because it would concern the execution of the law – in this case, the publication statutes.⁷

In sum, because publication has no bearing on respondents’ underlying constitutional claim and would have no legal consequences, it is clear that respondents simply seek a judicial declaration that H.R. 4042 became a law – a declaration that would be rendered in a completely abstract setting, since H.R. 4042 has expired even if it did become a law.⁸

⁶ In *The Pocket Veto Case* and *Wright*, the nonpublication and publication of the respective bills in question were not treated by the Court as determinative of their legal effectiveness. Thus, contrary to respondents’ suggestion (Sen.-Barnes Br. 31-32), the rights of a proper litigant to claim the legal benefit of a law cannot be defeated by nonpublication.

⁷ Nor have respondents shown even as a statutory matter that the publication statutes, which impose duties on the Archivist only with respect to bills that have become laws and that have been received by him (see Gov’t Br. 29-30 & n.23), were intended to furnish a vehicle for the litigation of a question that can arise only *before* the Archivist has obtained custody: whether the bill has become a law that in turn must be delivered *to* the Archivist. It is most improbable that Congress would have intended to create a private right of action to litigate that antecedent and fundamental constitutional question in so ministerial a context as the statutory framework for publication of a law, since publication does not affect legal rights in any concrete way.

⁸ Petitioners’ failure to urge their objection to the Senate’s standing prior to the issuance of the court of appeals panel opinion does not foreclose this Court’s consideration of the issue of respondents’ standing. See *Bender*, slip op. 6-7. Of course, both the panel and the district court were bound by the law of the circuit with respect to standing. See *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). In light of Judge Bork’s dissenting opinion and upon further reflection, petitioners no longer adhere to the view expressed in oral argument before the court of appeals that the Senate has standing in this case.

B.

If the Court does not dispose of this case on the standing and mootness grounds discussed in Point A, the judgment of the court of appeals should be reversed on the merits. On the very day that Congress presented H.R. 4042 to the President, it adjourned the First Session of the 98th Congress sine die. The Second Session of the Congress did not commence until more than nine weeks later. The Constitutional Convention specifically foresaw and supplied a clear rule to govern such situations in which Congress might withdraw from the lawmaking process before the expiration of the time permitted the President to consider a bill. In order to prevent the bill from remaining in limbo, the last Clause of Art. I, § 7, Cl. 2 provides that if the President does not sign the bill and "the Congress by their Adjournment prevent its Return, * * * it shall not be a Law." H.R. 4042 failed of enactment by operation of this Clause. As we have explained in our opening Brief, this conclusion is compelled by the text of the Pocket Veto Clause and of Art. I, § 7, Cl. 2 as a whole, as well as by the background and purposes of these provisions and their consistent application throughout virtually the entire history of the Nation. There is no merit to respondents' submission that H.R. 4042 became a law, despite the President's failure to sign it and Congress's adjournment sine die, merely because the House of Representatives authorized its Clerk to receive messages from the President after adjournment.

1. Respondents' argument would do serious damage to one of the most essential purposes of Article I, Section 7—that of furnishing clear rules to govern the lawmaking process, so that Congress, the President, and the people may know the legal status of bills that are pending at various steps in the process. As this Court recently explained, Art. I, § 7, Cl. 2 prescribes "a step-by-step, deliberate and deliberative process" (*Chadha*, 462 U.S. at 959) that was "finely wrought and exhaustively considered" by the Framers (*id.* at 951). Thus, it requires that a bill pass both Houses and be presented to the President; affords the President a specified number of days within which to consider the bill; and mandates a detailed procedure to be followed by the originating House and then the other House in reconsidering a measure that has been returned by the President with his objections.

In our view, the Pocket Veto Clause also furnishes a clear rule, under which the status of a bill in the circumstances to which it is addressed depends upon a public and formal action by one of the two Branches—either approval by the President, in which event the bill is a law, or (if the President does not sign the bill) the formal, bicameral act of adjournment by the Legislature, in which event "it shall not be a Law." Respondents argue, by contrast, that the Pocket Veto Clause, unlike all of the preceding clauses in Art. I, § 7, Cl. 2, does *not* prescribe a clear rule. As respondents candidly concede, their position is that the Clause "is not one of those constitutional provisions whose application is fixed" (Sen.-Barnes Br. 62), but instead that it states an "open-ended test" (H.R. Br. 46) that turns on "whether the potential dangers of uncertainty and delay" to which the Clause is directed are "'real' or 'illusory'" at a particular time or in a particular context (Sen.-Barnes Br. 47-48). Such an approach would be antithetical to the obvious intent of the Framers to adopt "[e]xplicit and unambiguous provisions" (*Chadha*, 462 U.S. at 945) to govern the interaction of the political Branches under the structure of the Constitution. Compare *Synar*, slip op. 14; *Buckley v. Valeo*, 424 U.S. 1, 124-127 (1976). As one commentator has observed, with respect to constitutional provisions such as the Pocket Veto Clause that pertain to the operation of the Government (as distinguished from the more general constitutional clauses addressing individual rights), the Framers "clearly had in mind some specific institutional design, and the interpretive task is simply to discover what it was that they meant." Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 854 (1985). Respondents point to no evidence whatever that the vague and changeable test they advance is what the Framers meant.

2. Respondents' argument also would effectively read the Pocket Veto Clause out of the Constitution.⁹ In respondents'

⁹ The Senate-Barnes respondents concede (Br. 40 & n.29) that the Pocket Veto Clause is applicable when "the Congress has terminated"—which, they assert, "occur[s] every two years at the end of a Congress," when there is a "[f]inal adjournment[]." As the House respondents note (H.R. Br. 47 n.54), however, the termination of congressional business at the end of Congress's biennial term results from internal rules of each House which have been

view, there are only two purposes served by the lawmaking provisions at issue here: assuring the President an adequate time to consider a bill presented to him, and assuring Congress the opportunity to repass the bill over the President's objections if he does not approve it. From this premise, respondents argue that the delivery of a bill to a congressional agent is sufficient to effect an actual return of the bill to the originating House itself, because it permits the President ten days within which to review the bill, and allows Congress an opportunity to repass the bill over his objections whenever it later reconvenes and receives the bill and the President's message from its agent. This submission treats the question of whether the return of a bill has been "prevent[ed]" by an adjournment as if the Constitutional Convention were concerned with nothing more than mechanics and the possible existence of an impediment to the actual physical delivery of a piece of paper to someone in the Capitol Building. "[T]he drafters had a less frivolous purpose in mind" (*Buckley v. Valeo*, 424 U.S. at 125).¹⁰

altered in the past. In any event, as we have pointed out in our opening brief (at 40-41 & n.29), there is no textual support for the notion that so-called "final" adjournments are unique in any respect that bears on the application of the Pocket Veto Clause, and this Court specifically rejected such a claim in *The Pocket Veto Case*. 279 U.S. at 680. Moreover, a construction limiting application of the Clause to so-called "final" adjournments would be unworkable because, as President Roosevelt explained to the Third Session of the 76th Congress, "it is impossible to determine at the time of the adjournment of the second regular session of a Congress whether or not it is the final adjournment of the Congress." 86 Cong. Rec. 9888 (1940). Even after what is thought to be a final session of a Congress, it can be reconvened by the President. Moreover, under modern practice, when Congress adjourns sine die, the House and Senate often authorize the Speaker and Majority Leader to reconvene the House and Senate if the public interest warrants. Pet. App. 5a n.7.

¹⁰ Respondents argue (H.R. Br. 28) that the "focal consideration" of the Pocket Veto Clause "is prevention of return, not adjournment," and that if the Framers had intended for the pocket veto to be applicable whenever Congress has adjourned, there would have been no need for them to speak of "prevent[ing]" return. This argument is misplaced. If the Framers had been concerned only with whether the physical delivery of a veto message was impracticable, any reference to adjournment would have been superfluous. The very language of the Pocket Veto Clause thus indicates that the Framers conceived of adjournment by Congress—especially, as here, an adjournment sine die—as an event that peculiarly prevents the return of a bill. See *Wright*, 302 U.S. at 608-609 (Stone, J., concurring in the result) ("The very force of the

As this Court made clear in *The Pocket Veto Case*, the provisions for return of a bill both reflect and serve another essential purpose in the lawmaking process. The Court held in that case that "under the constitutional mandate * * * no return can be made to the House when it is not in session as a collective body," because "it was plainly the object of the constitutional provision that * * * return of the bill * * * should enable Congress to proceed *immediately* with its reconsideration." 279 U.S. at 683, 684-685 (emphasis added). Thus, within the meaning of the Pocket Veto Clause, the return of a bill is "prevented" by an adjournment, even if the bill might be physically delivered to an agent of the absent House, because "[t]he House, not having been in session when the bill was delivered to the officer or agent, could neither have received the bill and objections at the time, nor have entered the objections upon its journal, nor have proceeded to reconsider the bill, as the Constitution requires." *Id.* at 684.¹¹ Respondents' interpretation accords no significance to this central purpose of facilitating expeditious reconsideration.

Moreover, the Court in *The Pocket Veto Case*, in an extensive discussion, explicitly rejected the argument that delivery of a bill to an agent of the originating House following an adjournment sine die could effect a "return" of the bill within the meaning of the Art. I, § 7, Cl. 2. The Court found that notion to be in conflict with the text, purposes, and consistent application of the

circumstances to which the words are applied gives emphasis to 'Adjournment' as that which prevents return, and to 'their' as referring to the action of those members of Congress which effects the adjournment.").

¹¹ Respondents' own description of what happens to a bill that is delivered to a congressional agent after adjournment illustrates how the return contemplated by the Constitution is "prevented" (Sen.-Barnes Br. 62):

In each instance, on the first day the originating House was in session, the agent formally transmitted the sealed envelope, which the President had stated contained the vetoed bill together with his objections, to the presiding officer. The date and time of receipt were noted both in the letter of transmittal and in the Congressional Record. The presiding officer announced in the chamber the receipt of the veto message in order for it to be read and to be spread upon the journal.

Under such a procedure, a bill simply is not "returned" to the originating House on the tenth day following its presentment. It is returned on the day that Congress reconvenes—a procedure that the Framers deliberately rejected. See page 17, *infra*.

Clause. 279 U.S. at 680-687. Respondents attempt to dismiss this discussion as mere dicta, relying on the Court's statement that neither House had actually adopted a rule authorizing an agent to receive such a delivery. See H.R. Br. 30; Sen.-Barnes Br. 45. However, that observation was but one phrase in a single sentence of the Court's seven-page discussion of the issue of effecting a return by delivery to an agent. See 279 U.S. at 684. The central thesis of that discussion was that delivery to an agent, with the actual submission of the bill and the President's objections to the originating House only at a later date, when it returned from its period of adjournment, would *not* comply with the constitutional requirement, but would instead "prevent" an effective return of the bill within the meaning of the Pocket Veto Clause. In light of that holding, the Court regarded the presence or absence of the sort of rule upon which respondents now rely as constitutionally *irrelevant*, and its passing reference to the absence of such a rule simply reflected that assessment. It would turn the constitutional holding of *The Pocket Veto Case* on its head to regard the Court's entire reasoning as mere dicta, as respondents propose.¹²

The concern for delay that may be occasioned by reliance on an agent has particular force in this case, in light of the nine-week delay until H.R. 4042 would have been submitted to the House at the start of the Second Session of the 98th Congress. Contrary to respondents' argument (Sen.-Barnes Br. 53-56), it does not matter that the originating House might not always schedule an immediate vote on the actual override of the President's veto, and instead might refer the bill to committee or dispose of it in some other manner. Even in that situation, the bill would have been formally returned to and be within the

¹² The Court clearly held that it was the timing of the adjournment *sine die* that was dispositive and caused the bill not to become a law: the bill failed because "[it was] presented to the President less than ten days (Sundays excepted) before the adjournment of that session, [and was] neither signed by the President nor returned by him to the House in which it originated" (279 U.S. at 672; see also *id.* at 691-692). The same sequence of events took place in this case, and the consequence under the unambiguous language of both the Pocket Veto Clause and *The Pocket Veto Case* is that H.R. 4042 "shall not be a Law." The operative effect that the Clause gives to the adjournment at the moment it occurs is unaffected by whatever arrangements one House might have made for an agent to receive a message from the President *after* the adjournment.

official cognizance of one of the political Branches, and thereby be capable of being acted upon, rather than being in limbo between the two Branches. As a result, the originating House is directly responsible to the people for whatever action it takes or fails to take. And, as noted in our opening brief (at 38 n.27), Congress traditionally has viewed itself as under a duty to give expeditious consideration to bills returned by the President.

3. The proceedings of the Constitutional Convention strongly support this interpretation of the Clause. As we have explained in our opening brief (at 36), the Committee of Detail at the Constitutional Convention considered but rejected a plan, patterned after the New York Constitution of 1777, that was indistinguishable in its practical operation from what respondents urge: the proposal stated that if the Legislature, by their adjournment, prevent the return of a bill, "it Shall be returned on the first Day of the next Meeting of the Legislature." 2 Farrand, *supra*, at 162. However, the Clause adopted by the Convention provides instead that such a bill "shall not be a Law." The Framers evidently anticipated the difficulties that could arise if a bill were kept in a state of suspended animation until the Legislature next met.

Respondents attempt to downplay the significance of this deliberate choice by speculating that the Committee of Detail and the Convention might not have given the wording of the Clause much thought. See Sen.-Barnes Br. 52-53 n.46; see also H.R. Br. 46 n.53. Such a notion of course is inconsistent with this Court's conclusion in *Chadha* that the lawmaking procedures in Art. I, § 7 were "finely wrought and exhaustively considered" (462 U.S. at 951), and with the fact that the alternative rejected by the Committee was already embodied in the Constitution of a major State. Respondents also suggest (Sen.-Barnes Br. 53 n.46) that the Framers might have rejected the proposal because they expected that periods of adjournment would be of extended length and did not anticipate that legislative business would carry over from one meeting to the next. However, as we have explained in our opening brief (at 49-50 & n.36), there is no reason to believe that the Framers had any fixed conception of the length of the sessions of Congress, and in fact the Continental Congress had been in almost con-

tinuous session between 1775 and 1784. But however that may be, the important consideration for present purposes is that the Framers deliberately chose *not* to adopt the approach respondents urge.

4. Respondents' repeated rhetoric (H.R. Br. 26, 30, 32, 34, 35, 39, 41, 42; Sen.-Barnes Br. 37, 38, 42) that the application of the Pocket Veto Clause results in an "absolute" veto that frustrates the will of the representative Branch was answered in *The Pocket Veto Case*. The Court explained that "[t]his argument involves a misconception of the reciprocal rights and duties of the President and of Congress," because the President must have the full ten days within which to consider the bill. 279 U.S. at 676-677. Accordingly, the Court stressed "that when the adjournment of Congress prevents the return of a bill within the allotted time, the failure of the bill to become a law cannot properly be ascribed to the disapproval of the President—who presumably would have returned it before the adjournment if there had been sufficient time in which to complete his consideration and take such action—but is attributable solely to the action of Congress in adjourning before the time allowed the President for returning the bill" (*id.* at 678-679). The Court added that "if Congress so desires the same bill may be re-introduced and passed when Congress resumes its session, and after receiving the due consideration of the President, if returned with his objections, may be then passed by the requisite vote in both Houses." *Id.* at 679 n.6. The option of repassing an identical bill of course remains available to Congress today and, unlike the vote to override a veto, requires only a simple majority of each House. Congress also has the option of postponing the presentment of the bill to the President for a sufficient time (perhaps only several days in the event of a brief intrasession recess) to assure that Congress will be in session should the President be disposed to disapprove and return the bill.¹³

¹³ Moreover, respondents' suggestion of an alleged frustration of the democratic process is misplaced, because "[t]he President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them" (*Chadha*, 462 U.S. at 948, quoting *Myers v. United States*, 272 U.S. 52, 123 (1926)).

5. Contrary to respondents' remaining contention, nothing in *Wright v. United States*, 302 U.S. 583 (1938), undermines the controlling force of *The Pocket Veto Case*. As we have explained in our opening brief (at 41-45), *Wright* dealt with an entirely different situation—the actual return of a bill during a brief, three-day recess of only one House during a session of Congress. Such recesses may be taken unilaterally by either House for up to three days, without the need for the concurrence of the other House that is required for adjournments that the Constitution deems to be substantial interruptions in the legislative process. Art. I, § 5, Cl. 4. The Court held that the return of a bill during such a one-House recess was effective, even though delivery was made in the first instance to the Secretary of the Senate, who then delivered it to the Senate itself at the conclusion of the three-day recess. The Court in *Wright* carefully stated its holding at the conclusion of its opinion (302 U.S. at 598):

We hold that where the Congress has not adjourned and the House in which the bill originated is in recess for not more than three days under the constitutional permission [in Art. I, § 5, Cl. 4] while Congress is in session, the bill does not become a law if the President has delivered the bill with his objections to the appropriate officer of that House within the prescribed ten days and the Congress does not pass the bill over his objections by the requisite votes.

Nothing in this limited ruling undermines the unanimous holding only nine years earlier in *The Pocket Veto Case*. And in fact the Court expressly reaffirmed both the specific holding in *The Pocket Veto Case* and its explanation of the operation and purposes of the Pocket Veto Clause where, as here, there has been an actual adjournment by "the Congress," rather than merely a three-day recess by only one House, as in *Wright*. 302 U.S. at 593-596. In particular, the Court reiterated that the purpose of the Clause is to prevent a bill from falling into a state of "suspended animation" and to enable the originating House to reconsider the bill promptly. *Id.* at 594-595. In reaching that conclusion, the Court carefully distinguished between "an ad-

journalment by the Congress" (*id.* at 589) and a "recess"—repeatedly finding an explicit constitutional demarcation in the requirements of Art. I, § 5, Cl. 4, the Three-Day Adjournment Clause (302 U.S. at 589, 590, 591, 592, 595, 596, 598)—and recognized that the former constitutes the kind of substantial interruption of the lawmaking process to which the Pocket Veto Clause is addressed. *Wright* therefore obviously furnishes no support for respondents' argument that the Pocket Veto Clause was inapplicable following the adjournment sine die in this case, after which Congress did not reconvene for more than nine weeks.

For the foregoing reasons and the additional reasons stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss because the case is moot and because respondents do not in any event have standing to bring this action. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
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OCTOBER 1986

No. 85-781

Supreme Court, U.S.

FILED

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JOSEPH P. SPANGL, JR.
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IN THE
Supreme Court of the United States
October Term, 1985

FRANK G. BURKE, ACTING ARCHIVIST OF THE
UNITED STATES, AND RONALD GEISLER,
EXECUTIVE CLERK OF THE WHITE HOUSE,
Petitioners,

v.

MICHAEL D. BARNES, ET AL.,
Respondents.

On Petition For a Writ of Certiorari
United States Court of Appeals for the
District of Columbia Circuit

**BRIEF OF AMICI CURIAE SENATOR
JOHN MELCHER AND REPRESENTATIVES
MIKE SYNAR AND CHARLES E. SCHUMER**

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September 6, 1986

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IN THE
Supreme Court of the United States
October Term, 1985

No. 85-781

FRANK G. BURKE, ACTING ARCHIVIST OF THE
UNITED STATES, AND RONALD GEISLER,
EXECUTIVE CLERK OF THE WHITE HOUSE,
Petitioners,

v.

MICHAEL D. BARNES, ET AL.,
Respondents.

On Petition For a Writ of Certiorari
United States Court of Appeals for the
District of Columbia Circuit

**BRIEF OF *AMICI CURIAE* SENATOR
JOHN MELCHER AND REPRESENTATIVES
MIKE SYNAR AND CHARLES E. SCHUMER**

This brief is filed on behalf of three members of Congress—Senator John Melcher and Representatives Mike Synar and Charles E. Schumer—who are concerned about the argument in petitioners' briefs, and in Judge Bork's dissenting opinion in the court of appeals, that individual members of Congress have no standing to challenge the President's attempted pocket veto of H.R. 4042.¹ *Amici's* concern is heightened by the fact that petitioners' brief appears to be a broad-scale attack on the standing of individual legislators to bring any suit to

¹ This brief is filed with the consent of the parties. Letters of consent have been filed with the Clerk of the Court.

challenge the action of other governmental officials or bodies as an unlawful infringement on the official power of a Senator or Representative. If accepted, petitioners' theory would close the courthouse door to members of Congress.

In *amici's* view, there is no reason for the Court to discuss, let alone decide, the issue of the standing of individual congressmen. First, as respondents and Judge Bork recognized, at least in this case, the standing of the Senate and the leadership of the House, on the one hand, and of individual members, on the other, are identical. All of the respondents have alleged precisely the same harm—*i.e.*, that the President's purported pocket veto has resulted in the Executive's failing to publish, preserve, and implement H.R. 4202, thereby depriving both Houses of Congress of their constitutional roles in the enactment of H.R. 4202, and, at the same time, nullifying the votes of the individual legislators who supported that bill. Accordingly, since the standing of individual legislators is based on the same theory asserted by the Senate and by the House leadership, acting collectively on behalf of the individual members, there is no reason for the Court to consider their standing separately.

Second, this case is an inappropriate vehicle for a full-scale exploration of the law of the standing of members of Congress because the standing claims asserted here are very different from those raised in many of the other contexts in which the issue has been presented. For over a decade, individual legislators have brought suits in a wide range of areas distinct from the purely law-making context at issue here. These include suits to protect the rights of individual legislators to participate fully in the legislative process, to safeguard the participation of the Senate in the appointment of Officers of the United States and in the ratification of Treaties, to preserve the House's role in originating legislation to raise revenues, and, most recently, to challenge the statutory budget reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985 (known as the Gramm-Rudman-Hollings Act).

In each of these areas, the question of the standing of individual legislators has turned on the nature of the process in-

involved (such as providing the President with advice and consent in the appointment of Officers of the United States) and the extent to which the legislator has been deprived of a right conferred by the Constitution to participate in that process. And in each of these areas, the lower courts have been sensitive to the separation of powers concerns which form the cornerstone of petitioners' standing attack, but have often dealt with those concerns through application of related justiciability doctrines, such as ripeness, political question, and equitable discretion. *Amici* submit that, given the markedly different questions raised in each of these contexts, and the fact that there is no need for the Court to consider the standing of individual legislators in this case, the Court should reject petitioners' suggestion that the Court engage in a wholesale review of the standing of members of Congress.

I. *The Senate And The House Have Standing.*

This action was initially brought by thirty-three members of the House of Representatives. In the district court, the United States Senate and the Bipartisan Leadership Group of the House of Representatives, composed of ranking leaders from both parties, were granted leave to intervene. In *amici's* view, there can be no doubt that the institutional respondents—the Senate and the leadership of the House—have standing to maintain this action. The President's purported pocket veto of H.R. 4204 caused direct and tangible harm to the participation of both Houses in the lawmaking process, since Article I vests the lawmaking power in these bodies. Therefore, if there is an improper exercise of the pocket veto power by the President, it directly infringes on Congress' constitutional right to enact legislation. As a result, the institutional respondents have plainly suffered an injury to the lawmaking powers that they have been assigned by the Constitution, and that injury is more than sufficient to confer standing. See *Goldwater v. Carter*, 444 U.S. 996, 998-1002 (1979)(Powell, J., concurring). Cf. *Coleman v. Miller*, 307 U.S. 433 (1939). Because this argument will be fully developed in the briefs of the respondents, *amici* will not restate it here. However, there are three observations *amici* wish to make regarding petitioners' standing argument.

First, contrary to the argument that runs throughout petitioners' brief, the injury suffered by respondents here is not the same as in those cases in which a President simply refuses to carry out a law which everyone agrees has been validly enacted. In such a case, Congress, at least in theory, can resort to the power of impeachment to remedy its grievances. But that alternative cannot be relied on here, where, even if respondents believe that the President is violating the Constitution, they have no basis for questioning his good faith in exercising the pocket veto. Thus, the injury here is distinctly one suffered by the two Houses which voted for H.R. 4202, and they have a right to go to court to vindicate their injury and to prevent its recurrence. Indeed, as a practical matter, Congress has no alternative.

Second, the separation of powers concerns raised by petitioners are largely illusory. While the lower courts have often determined that members of Congress have standing to bring an action, the courts have almost as frequently found the legislator's claims to be non-justiciable for other reasons, or have invoked the doctrine of equitable discretion to avoid consideration of the merits. See, e.g., *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984); *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1982); *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983). Thus, while there have been a number of cases brought by members of Congress that have overcome the standing hurdle, there have been only a handful of decisions on the merits. Therefore, while reaching to decide the congressional standing issue raised by petitioners may unnecessarily foreclose legitimate lawsuits by lawmakers, refraining from deciding the issue will by no means threaten the balance of power among the branches of government.

Lastly, stripped of its rhetoric, petitioners' argument seeks to convert what are, in essence, concerns over respect for the separation of powers principles embodied in the Constitution into a standing argument. Dismissal of this action is warranted, petitioners claim, in order to preserve the equilibrium among the branches established by the Constitution, and to ensure that

political give and take—not judicial rule—is the sole tool for resolving inter-branch disputes. In so arguing, it is petitioners, not respondents, who seek a change in the law of justiciability. This Court, over 180 years ago in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), made it clear that cases such as this—direct constitutional challenges to Executive action—were justiciable. And nearly twenty-five years ago, in *Baker v. Carr*, 369 U.S. 186, 217 (1962), the Court laid down the standards to guide it in determining whether a particular political question was fit for judicial resolution.

Petitioners' standing argument, if accepted, fundamentally undermines *Marbury* and *Baker*, and jeopardizes the ability of government to function in accordance with the Constitution. In no case cited by petitioners or the dissent below did courts intervene and issue a ruling until the governmental parties had reached an impasse that did not appear to be amenable to political resolution, as this case illustrates. Unless the courts remain open to review respondents' claim, serious allegations of unconstitutional action by the Executive would go unreviewed. The refusal of the courts to even consider a charge that the President has disregarded his constitutional duty to preserve, publish, and implement a law is hardly a trivial matter. At the very least, it raises questions about the viability of the law-making system spelled out in the Constitution and invokes the specter of the federal government brought to a halt by the intransigence of the President with regard to his duty under Article II to see that the laws are faithfully executed. Thus, to adopt the standing theory of the petitioners, this Court would have to retreat from its long-established view that interpretation of the Constitution does not imply a lack of respect for a coordinate branch; rather, "[i]t is, emphatically, the province and the duty of the judicial branch to say what the law is." *Marbury, supra* at 176. See *United States v. Nixon*, 418 U.S. 683, 703 (1974); *Goldwater v. Carter*, 444 U.S. 996, 1001 (1979) (Powell, J., concurring).

II. *The Standing Of Individual Members of Congress To Sue the Executive Branch Is A Complex Question Not Presented In This case.*

Amici urge the Court not to analyze separately the standing of the individual legislators. In order to highlight the reasons why the Court should be reticent to use this case as a vehicle to explore the broader question of the standing of individual legislators, we will briefly discuss some of the other contexts in which legislators have turned to the courts to vindicate their constitutionally protected interests.

At the outset, it is useful to distinguish this case—where the respondents' asserted injury relates to their lawmaking function under Article I, § 7—from cases where the claim of harm relates either to a legislator's ability to participate fully in the legislative process or to preserve a legislator's role in an essentially Executive process, such as the confirmation of federal officials.

In the former category, courts have often recognized the right of legislators to bring suit to safeguard their prerogatives as members of Congress. Thus, for example, in *Vander Jagt v. O'Neil*, 699 F.2d 1166 (D.C. Cir.), *cert. denied*, 464 U.S. 823 (1983), the court of appeals ruled that members of the House of Representatives had standing to bring suit against the House leadership challenging certain rules purportedly implemented to further entrench the majority party. And, in *United States v. AT&T*, 551 F.2d 384 (D.C. Cir. 1976), the court held that a member of Congress had standing to intervene in a case brought by the Executive Branch to enjoin AT&T from complying with a subpoena issued by a House Subcommittee to assert the interests of the House of Representatives in preserving its investigatory powers. *See also American Federation of Government Employees v. Pierce*, 697 F.2d 303, 304-306 (D.C. Cir. 1982). *Cf. Marsh v. Chambers*, 463 U.S. 783, 786 n.4 (1983); *Powell v. McCormack*, 395 U.S. 485 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966); *United States v. Ballin*, 144 U.S. 1 (1892).

As is clear, the questions relating to the standing of legislators to bring challenges of this sort are very different from those posed

here. In each of these cases, institutional interests of both individual legislators and Congress as an institution were at stake, but not necessarily susceptible to resolution through the normal course of political compromise. *Amici* urge the Court to avoid a ruling that closes the door to the courthouse once and for all to resolve disputes of this sort.

There are also a number of cases involving challenges by individual legislators alleging that they have been improperly excluded from participating in certain functions which are not law-making, but which are nonetheless expressly assigned to Congress under the Constitution. To begin with, there have been a number of cases in which Senators have brought suit to preserve their role under Art. II, § 2, of the Constitution in the approval of Treaties entered into by the United States. Thus, for example, in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.) (*en banc*), *vacated and remanded*, 444 U.S. 996 (1979), the court of appeals ruled that members of the Senate had standing to challenge the President's unilateral revocation of a Treaty with Taiwan, since the Senators had alleged that the President's action had denied them their right to vote on the Treaty revocation. While this Court's summary ruling does not fully explicate the Court's reasoning, Justice Powell's concurrence does make it clear that at least some members of the Court believe that, in certain situations, Senators could bring suit to challenge unilateral Executive action alleged to abrogate their right to vote on either Treaty ratification or revocation. *See also Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), *cert. denied*, 436 U.S. 907 (1978) (assuming without deciding that legislators had standing to challenge use of Treaty power to convey property, including the Panama Canal, to the Republic of Panama in violation of Art. IV, § 3, cl. 2, which gives Congress the exclusive power to dispose of federal property).²

² There have been a number of other cases brought by members of Congress challenging other aspects of the Executive's conduct of foreign affairs, including *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983) (*per curiam*); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973); *Harrington v. Schlesinger*, 528 F.2d 455 (4th Cir. 1974); and *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977).

There have also been a number of cases in the appointments area, where members of the Senate have filed suit to safeguard their right under Art. II, § 2, cl. 2, to advise and consent to the appointment of senior federal officers. Thus, for instance, in *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1982), the court of appeals held that a member of the Senate had standing to challenge the composition of the Open Market Committee of the Federal Reserve System, based on the claim that certain members of the Committee were acting as Officers of the United States but had not been confirmed by the Senate. *Accord Melcher v. Federal Open Market Committee*, Civil Action No. 84-1335 (D.D.C., Order of June 5, 1986)(finding that Senator has standing to challenge composition of the Committee); *but see Reuss v. Balles*, 584 F.2d 461 (D.C. Cir.), *cert. denied*, 439 U.S. 997 (1978)(challenge to composition of the Committee by Representative held non-justiciable) and *Committee for Monetary Reform v. Board of Governors*, 766 F.2d 538 (D.C. Cir. 1985)(private parties have no standing to challenge composition of Committee). Similarly, in *Williams v. Phillips*, 360 F. Supp. 1363 (D.D.C.), *stay denied*, 482 F.2d 669 (D.C. Cir. 1973), the court held that Senators had standing to challenge the appointment of an "acting" agency head as circumventing their right to participate in the confirmation of a senior federal officer. *See also Pressler v. Simon*, 428 F. Supp. 302 (D.D.C. 1978)(three-judge court)(*per curiam*), *aff'd mem. sub nom. Pressler v. Blumenthal*, 434 U.S. 1028 (1978)(member of Congress had standing to sue to challenge automatic raise in congressional salaries under the Ascertainment Clause, Art I, § 6); *Dennis v. Luis*, 741 F.2d 628 (3d Cir. 1984) (members of the Senate of the Virgin Islands had standing to sue to challenge the appointment of an Acting Commissioner of Commerce after the candidate had been rejected on confirmation vote by Senate).

And there has even been one case brought to preserve the House's primacy over revenue matters as set forth in the Origination Clause in Article I, § 2, cl. 1. In *Moore v. United States House of Representatives*, 733 F.2d 946 (D.C. Cir. 1984),

members of the House were found to have standing to challenge the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982, on the ground that since the Act was not introduced initially in the House, it violated House members' rights to originate and debate all legislation relating to raising revenue prior to consideration by the Senate.

As is apparent, the standing issues raised in the Treaty, Appointments, and Origination Clause cases are quite distinct from those at issue here. Yet in none of these cases are the interests asserted "generalized grievances" shared by all Americans, as petitioners contend. Rather, they are institutional interests, established by the Constitution, and unique to one or both Houses of Congress. These interests are not self-executing, and in many cases, neither the House nor the Senate, let alone an individual congressman, has a ready sanction available in the event of non-compliance. While the process of political give-and-take has historically resolved many of the disputes that have arisen in these areas, there can be no doubt that, on occasion, impasse will be reached, and deadlock will set in. Indeed, in each of these cases, legislators were seeking protection from the courts only after a head-on confrontation occurred. Without the availability of judicial review, it is at least possible that these important constitutional checks will become nearly unenforceable, and that Executive or congressional action in derogation of these constitutional provisions will be essentially unreviewable. Thus, for example, following the logic of *Committee for Monetary Reform*, *Reuss*, and *Riegle*, it is doubtful that anyone other than a Senator could challenge the composition of the Federal Open Market Committee. To deprive members of the Senate of standing to bring such cases—as petitioners urge—would at least in many cases insulate alleged violations of the Appointments Clause from challenge. *Amici* urge the Court not to take such a drastic step in the course of deciding this case, but rather to reserve its consideration until these issues are properly presented for review.

In addition to the cases in which legislators seek to enforce rights explicitly conferred on them by the Constitution, there are

a number of cases in which members of Congress have brought suit to challenge the constitutionality of legislation. Obviously, in many of these suits, the legislator's standing is no different than that of other adversely affected members of the public, and *amici* do not urge that a different set of rules should apply. However, there are other cases in which the legislator's standing differs markedly from that of the public because the operation of the statute itself deprives the legislator of his official power. Recently, a three-judge court in *Synar v. United States*, 626 F. Supp. 1374 (D.D.C.)(*per curiam*), *aff'd sub nom. Bowsher v. Synar*, 106 S. Ct. 3181 (1986), upheld the standing of members of Congress to challenge the mandatory deficit reduction features of the Gramm-Rudman-Hollings Act. 626 F. Supp. 1381-83. In so ruling, the court found justiciable the lawmakers' claim that the mandatory budget reduction mechanism in the Act infringed upon their lawmaking powers under Art. I, § 7, to enact laws regarding federal spending. *Id.*

While this Court found it unnecessary to reach the question of the standing of individual legislators, there are two features about *Synar* worth noting. First, petitioners' standing argument might well have barred the congressional plaintiffs from maintaining that action. As noted, the principal standing theory asserted by the legislators was that the Gramm-Rudman Act would nullify their votes on future appropriation legislation.³ But that is precisely the theory that petitioners contend is inadequate to support the standing of an individual member of Congress and that we urge the Court not to address in this case. Second, the jurisdictional statute at issue in *Synar* specifically authorized suits by members of Congress because Congress itself was uncertain of the constitutionality of its actions. In cases like *Synar*, it may be necessary in order to achieve consensus on the underlying legislation to include provisions that facilitate immediate and expeditious judicial review, thereby

³ In addition to asserting standing on the basis of their legislative powers, the congressional plaintiffs in *Synar* alleged that the Gramm-Rudman Act would unconstitutionally result in the cutting of their salaries and the resources of their staffs.

eliminating any non-Article III or prudential bars to adjudication. Indeed, in *Synar*, not only was Congress concerned, but the President also gave more than tacit approval to the Act's special review provision by expressly noting in his signing statement that provision had been made in the Act that doubts about its constitutionality could be promptly resolved by the courts. 21 Weekly Comp. of Pres. Doc. 1499-1500 (December 16, 1985). Thus, especially where Congress and the President expressly contemplate judicial review in cases brought by members of Congress, this Court should not irrevocably close the courthouse door to such actions by adopting petitioners' broad non-justiciability theory.

CONCLUSION

As the foregoing discussion demonstrates, there are a number of widely varying contexts in which congressmen have turned to the Courts to enforce their official rights. This case—which focuses solely on the lawmaking function of Congress—is not an appropriate vehicle for undertaking a comprehensive review of the standing of legislators. Accordingly, *amici* urge the Court to put aside for another day the examination of the broad question of congressional standing.

Respectfully submitted,

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September 6, 1986